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Supreme Court of the United States

OCTOBER TERM, 1993

IVAN VON ZUCKERSTEIN, DR. DEVABHAKTUNI RAMASWAMI, DR. MOHAN JAIN, and JOSIP VRESK,

Petitioners,

v.

ARGONNE NATIONAL LABORATORY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether naturalized American citizens and permanent residents ("Immigrant Americans") must meet higher degree of proof, under more exacting rules of law than other Americans to show racial and ethnicity discrimination under 42 USC §1981 and Title VII.

Whether Immigrant Americans were denied their right of jury trial and equal protection of law in employment discrimination case, when the court of appeals held that, (1) the private employer is not liable for direct evidence of racial, ethnic, and retaliatory animus of its supervisors, (2) despite direct evidence of discriminatory motivation by decision-making supervisors, the *McDonnell Douglas* burden shifting method applies, rather than the *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252, and *TWA v. Thurston*, 469 U.S. 111, burden-shifting framework, (3) employers can deny employees their contract right to in-house grievance procedure on the ground that employees filed discrimination charges with EEOC, (4) promotion from worker to supervisor does not meet the "new and distinct relationship" standard for §1981 claim under *Patterson*, (5) inferences can be drawn in favor of employer, and employee evidence need not be believed in ruling on employer's motion for directed jury verdict, and that (6) racially motivated retaliation because employees attempted to enforce their contract rights is not a claim cognizable under 42 USC §1981.

Whether the Civil Rights Act of 1991 should be applied to pending cases, and whether appellate court erred in awarding employer costs on appeal after the 1991 Civil Rights Act became effective, and after employees proved

racial, ethnic, and retaliatory motivation in making adverse decisions about employees.

Whether dismissal of Title VII claims was against the weight of evidence, and improper before jury verdict on §1981 claims.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Ivan Von Zuckerstein, Dr. Devabhaktuni Ramaswami, Dr. Mohan Jain, and Josip Vresk, respectfully request that a Writ of Certiorari issue to review the opinions of the Seventh Circuit Court of Appeals and the United States District Court for the Northern District of Illinois, Eastern Division, issued in the above-entitled proceedings.

OPINIONS BELOW

The January 29, 1993 Opinion of the Seventh Circuit Court of Appeals, Von Zuckerstein, et al. v. Argonne National Laboratory, No. 91-2490 published as 984 F.2d 1467 (7th Cir. 1993), March 26, 1991 Opinion of the District Court for the Northern District of Illinois, Eastern Division, Case No. 86 C 6304, published as 760 F. Supp. 1310 (N.D. Ill. 1991) and the unpublished April 24, 1991 and May 31, 1991 Opinions of the District Court for the Northern District of Illinois, Eastern Division printed in the Appendix hereto.

JURISDICTION

The Opinion of the United States Court of Appeals for the Seventh Circuit in this matter was entered on January 29, 1993, and rehearing was denied on April 7, 1993. The time to file Petition for the Writ of Certiorari was extended to September 4, 1993 by Order of the U.S. Supreme Court dated June 22, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254.

RELEVANT STATUTES

The pertinent sections of 42 U.S.C. Secs. 1981, 2000e-2, 2000e-3, and 2000e-5(g)(2)(B) are set forth in the Appendix at pp. 72-73.

STATEMENT OF THE CASE

Throughout the 20th Century, immigrant scientists and engineers made major contributions to the advancement of American science and technology, e.g. Einstein, Von Braun, Fermi, Teller. The current shortage of adequately trained native-born engineers and scientists makes the presence of immigrants indispensable for the functioning of the nation's industrial system. The principal issue in this litigation is whether immigrants of different race and ethnicity must remain mere providers of technical knowledge and skills, or whether they can compete with other Americans for advancement into management.

Petitioners complain that they were denied advancement into supervisory positions because of their race and ethnicity in violation of Section 1981 and Title VII. Every claim in this litigation is tied to the denial of promotion from worker to supervisor, and to actions taken by petitioners' supervisors because petitioners sought supervisory positions, or because petitioners complained internally, to the EEOC and to the court about the denial of supervisory promotions. The "Glass Ceiling" because of petitioners' race and ethnicity is thus the focal point of this litigation.

Petitioners complain that the trigger point for adverse employment decisions about them was the petitioners' extraordinary work accomplishments, exceptional outside recognition, or the creation of new research programs that normally lead to promotion into management. (Award of its highest scientific honor by AICHE to Ramaswami, public exhibit of Von Zuckerstein's work by the U.S. Government, creation of new research programs by Jain, Chang and Von Zuckerstein.)

Defendant Argonne National Laboratory ("Argonne") is a private employer operated by a private university, the

University of Chicago. Argonne employees are employees of the University of Chicago. The U.S. Government and its agencies, departments, etc. have no liability whatsoever in this litigation.

Petitioners Ramaswami and Jain are brown-skinned Indian-Americans, Chang is a yellow-skinned Chinese-American, Von Zuckerstein is a German-American, and Vresk is a Croat-American. All have lived in the U.S. more than 20 years. Jain, Chang, Ramaswami and Von Zuckerstein worked in the Energy and Environmental Systems Division ("EES"), and Vresk worked in the Plant Facilities and Services Division ("PFS").

DENIAL OF STANDARDS FOR DIRECT EVIDENCE OF DISCRIMINATION

Petitioners in this litigation have shown by direct, undisputed evidence that their Argonne supervisors made adverse employment decisions about petitioners on the basis of petitioners' race, ethnicity, and because petitioners filed EEOC charges and the instant lawsuit. The direct evidence includes, but is not limited, to the following:

(1) In a 1983 management meeting attended by director Sather, director Bernard and supervisor Faddis, director Sather or Bernard stated that Jain cannot be a program manager of his program because "the sponsor didn't want an *Indian in charge* of the program." In 1984, Sather denied Jain's application for a supervisory position in a research program that Jain conceived and developed jointly with another Immigrant-American, John Bratis. In 1985, Sather denied Ramaswami's applications for three advertised position on the ground that said positions were supervisory.

(2) Director Sather directed Argonne managers under him that "Chinese Types" are not to be hired. Chang ap-

plied for 9 advertised positions under Sather in Chang's recognized area of expertise. Chang was not hired. Chang was laid off after he complained to Sather about removal from supervisory position in Chang's program. Sather denied applications for hire of other qualified Asian-Americans (Jain 4, Ramaswami 3).

(3) Director Bernard advised the U.S. Government that Von Zuckerstein will not be rehired at Argonne because he is suing Argonne for discrimination. Von Zuckerstein applied for 50 advertised positions, but was not rehired. One of these 50 positions was an apprentice position in district heating under Bernard (Assistant Economist). The achievements of Von Zuckerstein's prior work in district heating were the topic of a U.S. Government public exhibit in Washington, D.C. Bernard denied Von Zuckerstein's application for the job of an apprentice in district heating. None of the petitioners in this lawsuit were rehired for work in their area of expertise after they applied for advertised positions at Argonne (Chang 9, Jain 4, Ramaswami 4, Von Zuckerstein 50).

(4) Processing of Ramaswami's routine layoff extension was interrupted at the very instant Argonne managers learned that Ramaswami filed an EEOC discrimination charge. This resulted in an immediate termination of Argonne employment for Ramaswami.

(5) Argonne denied Ramaswami, Jain and Von Zuckerstein their contract right to an in-house discrimination complaint procedure for the sole reason that they filed EEOC discrimination charges. This left the entire burden to the EEOC and the federal courts. Argonne further denied petitioners their contract right to have their discrimination complain investigated, and refused to collect any data on representation of Immigrant-Americans in management, to investigate petitioners' complaints of statistical-

ly significant underutilization of immigrants in Argonne's management.

(6) Supervisor Meshenberg conducted a study of Von Zuckerstein's ethnicity and determined it to be German. Meshenberg testified that there is an animosity between the Jews and the Germans. Meshenberg is Jewish. Von Zuckerstein was laid off because Meshenberg rated him the lowest in various sub-areas of economics. Meshenberg has no background in economics, and he testified that he never supervised any of Von Zuckerstein's work in economics. Meshenberg also wrote various undated, unsigned and untrue damaging documents that he secretly placed in Von Zuckerstein's personnel file. After Von Zuckerstein complained of discrimination, Meshenberg lowered his performance evaluation from "Good" to "Unsatisfactory".

(7) In May of 1984, all white, native born project managers were placed into a newly formed project management group and continued to function as supervisors. All immigrant project managers including petitioner Vresk and three non-white immigrants were summarily demoted to non-supervisory positions. Vresk repeatedly requested to be placed into the project management group but his requests were denied. Vresk's management duties were given to less qualified, white, native born employees. Vresk was better qualified than all the native born employees in the project management group.

(8) Argonne documents showed that before Ramaswami and Jain were hired, Argonne managers had to request an exemption from Argonne policy giving preference to native-born employees.

(9) All supervisors under director Bernard were white, native born. Director Bernard admitted in his testimony that he did not consider non-white immigrants for supervisory promotions.

The appellate court acknowledged that Argonne supervisors were motivated by racial animus when making adverse employment decisions about petitioners. The court held:

> "While the petitioners may have offered evidence of racial animus on the part of supervisors at Argonne, none has offered any direct evidence of discriminatory intent on the part of Argonne."

The court held that petitioners are not entitled to the standards for direct evidence of discrimination under *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed. 2d 523 (1985) and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252, 104 L.Ed. 2d 268, 109 S.Ct. 1775 (1989) and must prove discrimination by indirect evidence under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) standard. In the *McDonnell* analysis, the court then eliminated from consideration all direct evidence of racial, ethnic and retaliatory motivation of Argonne supervisors as it pertained to review of jury issues and the lower court ruling granting Argonne motion for directed jury verdict.

For instance, the court held that Ramaswami produced no direct evidence of discrimination against Indians in support of his claim that director Sather denied him promotion to supervisory positions of senior engineer. Contrary to the court's holding, Ramaswami produced direct evidence that Sather demoted Jain because "the sponsor did not want an Indian in charge of the program", and that Sather directed that "Chinese Types" are not to be hired.

Similarly, the court, in analyzing Von Zuckerstein's claim of failure to rehire for 50 positions, excluded direct evidence that director Bernard stated to the U.S. Government that Von Zuckerstein will not be rehired because he is suing Argonne for discrimination.

The court also makes no mention of the other direct evidence of discrimination in its analysis of Section 1981 jury issues and review of the motion for directed verdict. Based on *McDonnell Douglas* analysis of only the indirect evidence, the court upheld the direction of the verdict on all issues.

DENIAL OF IN-HOUSE GRIEVANCE PROCEDURE

Evidence showed that Argonne denied Ramaswami, Jain and Von Zuckerstein their contract right to have their discrimination complaints thoroughly investigated and aired in an in-house grievance procedure. Argonne's denial was on the grounds that petitioners filed EEOC discrimination charges. EEOC issued a determination that Argonne unlawfully retaliated against Jain and Ramaswami. Evidence showed that Argonne never collected any data to make any investigation of underutilization of immigrants as charged, not for the EEOC, and not on its own. Jain and Von Zuckerstein made another complaint unrelated to discrimination in another Argonne procedure called "Equity Review". Argonne completed the "Equity Review" of these non-discrimination issues and notified Jain and Von Zuckerstein of its results.

The appellate court held that petitioners were not prejudiced when Argonne denied them the in-house discrimination procedure because Argonne communicated its answer to the discrimination charges to the EEOC. The court drew an inference that Argonne made the same investigation to formulate its answer to the EEOC charges as was required in internal grievance procedures. The court held further that Argonne investigation of complaints unrelated to discrimination in the "Equity Review" relieved Argonne of its obligation to give Jain and Von Zuckerstein the in-house grievance procedure for discrimination complaints.

SUPERVISORY POSITION AS A "NEW AND DISTINCT RELATIONSHIP"

Vresk, Ramaswami, Jain and Von Zuckerstein were each denied a promotion from worker to supervisor for which they applied. Vresk was denied the position of project manager in the project management section, Ramaswami was rejected by Sather for several supervisory positions as a senior engineer and a manager, Jain was rejected by Sather for the position of principal investigator, and Von Zuckerstein was denied promotion to manager of the district heating program. In each instance, the jobs were given to less qualified, white, native-born employees (Vachta, Bartusek, Schertz, Lazar and Kennedy).

The appellate court held that Vresk's and Ramaswami's promotion from worker to supervisor do not meet the "new and distinct relationship" test under *Patterson v. McLean Credit Union*, 491 U.S. 164, 181, 109 S.Ct. 2363, 2375, 105 L.Ed. 2d 132 (1989), and therefore do not state a Section 1981 claim. The court also held that denial of Jain's promotion to principal investigator does not constitute a failure to promote. The court did not address the denial of Von Zuckerstein's promotion to manager of the district heating program at all. The court also did not address the question whether Vresk proved his Title VII claim by undisputed evidence that he was denied a supervisory promotion for which he applied, and that the job was given to a less qualified, native-born employee.

INFERENCES IN FAVOR OF MOVANT IN DIRECTING A JURY VERDICT

In upholding the direction of the jury verdict, the appellate court resolved conflicts in the evidence in favor of the movant, drew inferences from the facts in favor of the movant and against the non-movant, and did not give any weight to the bulk of petitioners' undisputed evidence of racial, ethnic and retaliatory motivation.

For instance, the court gave no weight to the direct evidence of discrimination outlined in (1) through (9) above.

The court held that Ramaswami failed to show that Argonne's reasons for denying Ramaswami promotion to three senior positions were pretextual. Argonne claimed that Ramaswami lacked qualifications for said positions in the EES Division.

EES Division Director Croke testified that number of publications and outside scientific recognition were the criteria for promotion to a senior engineer. The Argonne personnel manual showed that patents are also required. Undisputed evidence showed that Ramaswami exceeded the relevant qualifications of all senior engineers in the EES Division as shown below.

A. BROWN SKIN

NAME	# PUBLICATIONS	# PATENTS	OUTSIDE SCIENTIFIC RECOGNITION
RAMASWAMI	93	5	Elected Fellow of AICHE

B. WHITE SKIN

NAME	# PUBLICATIONS	# PATENTS	OUTSIDE SCIENTIFIC RECOGNITION
CROKE	4 or 5	1 or 2	NONE
SCHERTZ	20 to 87	5	NONE
SATHER	20 to 87	5	NONE

The evidence shows that Ramaswami met or exceeded the comparable qualifications of white employees who were promoted, and that Argonne contentions of lack of qualifications for the positions are pretextual. Ramaswami's immediate supervisors Timm and Chopra testified that they each recommended Ramaswami for promotion to senior engineer. Evidence showed that the promotions are initiated

by the immediate supervisors, not the senior personnel in his division that the court held relevant.

Evidence shows that each petitioner in the EES Division was laid off at the time they were to be promoted into supervisory positions. Ramaswami was laid off in September of 1985, several months after he was elected a "Fellow" of AICHE, which gave him the highest outside scientific recognition of any employee in the EES Division. Director Lewis wrote that Ramaswami was laid off as "the least valuable of our personnel". Except for Ramaswami, no "Fellow" in a scientific society was ever laid off from Argonne. Undisputed evidence shows that Ramaswami was the best qualified employee of EES. All EES managers are white, native-born.

Jain was laid off within months of his application for a supervisory position of a principal investigator in the research program that Jain conceived and developed with John Bratis. Jain's supervisor testified that Jain was absolutely qualified for said promotion, and that Lazar was less qualified. Lazar is white, native born. Lazar was given the principal investigator position and Jain was laid off.

In November of 1982, director Kuczen asked that Von Zuckerstein be promoted to manager of the district heating program. Within weeks after that, Meshenberg went to the Argonne Personnel Department to see if Von Zuckerstein could be fired. Meshenberg admitted that the decision to lay off Von Zuckerstein was made at that time, months before the complex layoff selection and multiple evaluation process took place. Meshenberg also admitted that he had no knowledge of Von Zuckerstein's work and that he therefore relied on input from A. Kennedy, who competed with Von Zuckerstein for the job of manager of the district heating program. A. Kennedy has no quali-

fications in district heating but he was given the job. A. Kennedy is white, native born.

Chang was laid off after he protested his removal as manager of the biomass program by Sather. The job was given to R. Niemann. Niemann testified that he did not have any qualifications in biomass, and admitted that Chang had excellent qualifications in biomass. Niemann is white, native born.

Evidence shows that Jain and Von Zuckerstein were removed from charge of new research projects that they themselves created, developed and secured funding for from the U.S. Government (Jain - $500,000-ORC project, Von Zuckerstein - $600,000-RCS program).

Argonne did not produce any evidence that any white, native born employee was ever removed from charge of a program he or she developed.

The appellate court held that Von Zuckerstein did not identify any specific position of the 50 positions for which he applied, and that he was not qualified for the positions identified for him by Bernard. Evidence shows that Von Zuckerstein applied for the job of an apprentice in district heating, the job he held before his layoff (Assistant Economist). The U.S. Government (DOE) exhibited the results of Von Zuckerstein's work in district heating in a public exhibit in Washington, D.C. as a notable scientific achievement (the first application of a new district heating technology in America). Director Kuczen asked that Von Zuckerstein be promoted to manager of the district heating program. The court accepted Bernard's unsupported averment that Von Zuckerstein was not qualified. Bernard has no qualifications in district heating (engineering, economics, finance or law), and Bernard admitted that he never supervised Von Zuckerstein's work, having been transferred into Von Zuckerstein's area at the time of Von

Zuckerstein's layoff. Trial court held that Von Zuckerstein was qualified for some of the 50 positions, but that his letters complaining of discrimination "poisoned the well" and justified employer's refusal to rehire.

The appellate court held that Jain failed to identify the specific job descriptions and qualifications for the two positions he sought after being laid off. Evidence shows that Jain applied for two jobs in system modelling and analysis, and one job as a mechanical engineer. Undisputed evidence shows that Jain worked as a modeler and an analyst for a year and a half at Argonne before his layoff, and further that he holds a doctorate in mechanical engineering. Argonne produced no evidence that Jain was not qualified for the three positions. Jain was not rehired.

The appellate court held that both Argonne supervisors denied the statement that Jain cannot be manager because "the sponsor does not want an Indian *in charge* of the program." The evidence totally contradicts the court's ruling. Sather testified that he does not recollect one way or the other, and Bernard denied that an entirely different statement was made, namely that "the sponsor did not like Indians *working* on a project." The focus of this litigation is that non-whites and immigrants were barred from becoming supervisors, not that they could not be workers.

The appellate court held that Von Zuckerstein was denied promotion to a full scientist because of lack of publications and his inability to work independently. Evidence showed that Von Zuckerstein was assigned to work in another division (Engineering Division "ENG") and both his EES supervisors Meshenberg and Bernard admitted to having had no supervision and no knowledge of his work. Von Zuckerstein's supervisors in Engineering Division (Pascual, Kuczen and Matousek) rated Von Zuckerstein's performance "excellent", "one you can rely on" and "outstand-

ing", respectively. The inability to work independently contention clearly is pretextual. Evidence shows that Von Zuckerstein worked independently without any supervision in another division (Engineering Division).

Evidence showed further that Von Zuckerstein's position description did not require publications, and that the U.S. Government directed that federal funds for district heating activities at Argonne must not be spent on publications. Argonne promotion guidelines provide that in applied science, publications may not be possible, and that in such case the scientist's work must be documented for the promotion. The U.S. Government recognized the extraordinary significance of Von Zuckerstein's work results when it organized a public exhibit of Von Zuckerstein's work. Argonne did not produce any evidence that the work of any promoted employees in EES was similarly honored.

Argonne manual indicates that the promotion to full scientist is routine and most employees get it. The lack of publications contentions are clearly pretextual because publications were not a part of Von Zuckerstein's duties at Argonne.

The appellate court held that Ramaswami was transferred out of his field of expertise because of a decrease in demand for Ramaswami's skills. The evidence shows that the demand has grown and that additional employees were brought in at the time of Ramaswami's transfer to handle the greater workload (Schlenger, Chuang, Wang).

The appellate court held that EES made adverse decisions about petitioners because of lack of funding, funding cuts, etc. Uncontradicted evidence showed that EES Division and the specific groups in which petitioners worked experienced dramatic growth in funding and employment at the time of petitioners' layoffs. For instance, the evi-

dence showed that the petitioners' work groups added 55 new employees in the relevant period from February of 1983 to November of 1984. The court adopted Argonne's unsupported statement about the funding cuts, and gave no weight to Argonne documents showing long lists of new employees and explosive growth in funding in the very groups that laid petitioners off.

The appellate court held that the only system application economist retained after Von Zuckerstein's layoff was foreign born (Teotia). Undisputed evidence showed that 6 months after said layoff, all systems application economists except Von Zuckerstein continued working at Argonne (Poyer, Suchy). The evidence clearly showed respondent's mastery at producing self-serving documents, purporting one thing, while Argonne did exactly the opposite.

The appellate court held that the reason for Jain's removal as principal investigator of the industrial cogeneration project was extreme delays in the project. Undisputed evidence showed that Argonne took no action against Jain's co-principal investigator Faddis, who was jointly responsible for the project. Faddis is white, native born. Jain was replaced by Mr. Lazar, who is white, native born, and does not have a doctorate like Jain. Evidence showed that the project caught fire under Lazar's direction, causing an extensive delay. Argonne took no action against Lazar but laid off Jain. Undisputed evidence shows further that the delays Argonne now claims were the reason for Jain's demotion occurred after said demotion, and that the delays were caused by a white employee Thomas. Thomas was appointed into the project by director Sather over Jain's strong objection. The delays occurred because Jain was removed from charge of the project, and was replaced by less qualified, white, native born employees at the direction of director Sather.

The appellate court held that racially motivated retaliation because employees attempted to enforce their contract rights is not a claim cognizable under 42 USC §1981. Freedom from discrimination was petitioners' contract right set forth in Argonne manual under the heading of mutual obligations of Argonne and employees. Refusal to rehire Von Zuckerstein because he is suing Argonne, pulling back Ramaswami's layoff extension because he took steps to enforce his contract right to non-discriminatory work environment, and the denial of in-house grievance procedures, are among the examples of retaliation on the basis of race and ethnicity.

There is no evidence that Argonne disapproved of the discriminatory actions of Argonne supervisors, or that it disciplined or sanctioned them in any way. To the contrary, Argonne promoted Sather first to deputy division director and then to division director. Argonne also refused petitioners their contract right to have their discrimination grievances quickly investigated, aired and resolved in the in-house grievance procedures. The fact that Argonne's professed justifications for its actions were all shown to be pretextual indicates Argonne's intent to continue its discriminatory practices, and to condone and ratify discriminatory actions by Argonne supervisors.

CIVIL RIGHTS ACT OF 1991 APPLIES TO PETITIONERS' CLAIMS

The Civil Rights Act of 1991 provides that petitioners can recover their costs if they produce evidence of motivation by an unpermitted factor. This is so even if petitioners do not prevail on their claims. The Act became effective on November 21, 1991. On January 29, 1993, the appellate court awarded costs to the respondent instead of the petitioners. Petitioners produced ample direct evidence of unlawful discrimination and racial motivation as shown above.

BASIS OF JURISDICTION IN THE TRIAL COURT

Jurisdiction of the trial court was invoked pursuant to Title VII of the Civil Rights Act of 1964 42 USC §2000 et seq. and the Civil Rights Act of 1866, 42 USC §1981. The court has jurisdiction pursuant to 42 USC §2000e-5(f)(3) and 28 USC §§1331, 1343, 2201 and 2202.

REASONS FOR GRANTING THE WRIT

It is beyond question that petitioners were discriminated against on the basis of race. The appellate court held that Argonne supervisors were motivated by racial animus. However, the court applied entirely different rules of law to deny petitioners' claims in conflict with decisions of the Supreme Court, in conflict with decisions of the other courts of appeals, and in conflict with its own precedents.

A.

PRIVATE EMPLOYERS ARE LIABLE FOR DISCRIMINATORY CONDUCT OF THEIR SUPERVISORS.

The appellate court held that it is not sufficient for the Immigrant Americans here to show by direct evidence that Argonne supervisors were motivated by racial and ethnic considerations when making adverse decisions about petitioners. The court held that petitioners must show discriminatory intent on the part of Argonne, separate and apart from the discriminatory intent of Argonne directors. The ruling is in conflict with decisions in the other circuits, and with the prior decisions in the 7th Circuit.

In *Craig v. Y&Y Snacks, Inc.*, 721 F.2d 77, 80 (3rd Cir. 1983) the court held that it is widely recognized in racial discrimination cases that an employer is liable as a principal for discriminatory actions of supervisors. Apparent authority to act as supervisor is sufficient for employer's

liability. *Gay v. Board of Trustees of San Jacinto College*, 608 F.2d 127, 128 (5th Cir. 1979). Even if upper management record on race relations is exemplary, employer is nevertheless liable for discriminatory decisions of lower level supervisors. *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (6th Cir. 1972). An employer is held liable for the discriminatory actions of its supervisors which affect the tangible job benefits of an employee on the basis of race, religion or national origin. *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982).

The ruling is also in conflict with prior decisions of the 7th Circuit Court of Appeals. In *Horn v. Duke Homes*, 755 F.2d 599, 605 (7th Cir. 1985) the court acknowledged that the courts have universally applied the rule that employers are strictly liable for the discriminatory conduct of their supervisory personnel. See also *Flowers v. Crouch Walker Corp.* 552 F.2d 1277, 1282 (7th Cir. 1977).

The employer's liability is reinforced by the fact that Argonne took no remedial action upon notice of the discriminatory conduct of its supervisors. Quite the contrary. Evidence shows that Argonne denied petitioners their contract right to have their discrimination complaints "thoroughly investigated, aired and resolved within the laboratory with the counseling and attendance by affirmative action representative." Undisputed evidence shows that Argonne did not collect any data to commence investigation of petitioners' complaint that people like them are excluded from management, and affirmative action director testified that her office did nothing in response to petitioners' race discrimination complaints.

Like other private entities, universities, consultants and the like, Argonne receives federal money under contract with the U.S. Government to cover a part of its operations. Said contract imposes affirmative obligation to

remedy discriminatory problems for the benefit of the employees. The evidence shows that Argonne did not do anything to remedy the discriminatory actions of its supervisors after it received notice thereof.

In holding that Argonne is not responsible for direct evidence of racial animus of its supervisors, and by excluding said direct evidence from review of lower court ruling granting Argonne's motion for directed jury verdict, the appellate court denied petitioners their 14th Amendment right of due process and equal protection of laws, and the 7th Amendment right of a jury trial.

B.

MC DONNELL DOUGLAS ANALYSIS IS INAPPLICABLE AFTER PETITIONERS PRODUCED DIRECT EVIDENCE OF RACIAL ANIMUS.

The appellate court held that even though petitioners showed by direct evidence that their supervisors were motivated by racial animus, their claims should be analyzed using the indirect evidence, burden-shifting method under *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The court then eliminated all direct evidence of racial animus from the *McDonnell* analysis of jury issues.

In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 83 L.Ed.2d 523, 533 (1985) the Supreme Court decided that the *McDonnell Douglas* test is inapplicable where the petitioner presents direct evidence of discrimination. Other courts of appeals have uniformly applied this standard. *Bibbs v. Block*, 778 F.2d 1318, 1324 (8th Cir. 1985), *Blalock v. Metal Trades*, 775 F.2d 703, 711 (6th Cir. 1985), *Miles v. MNC Corp.*, 750 F.2d 867, 875 (11th Cir. 1985). The burden of proof immediately shifts to the employer. *Fields v. Clark University*, 817 F.2d 931, 937 (1st Cir. 1987).

Direct evidence is evidence that "shows that the impermissible criterion played some part in the decision-making process." *Tyler v. Bethlehem Steel Corp.* 958 F.2d 1176, 1183 (2nd Cir. 1992) Cert. Den.

The burden of proof shifts to the employer even if no direct evidence is present, if petitioners produce circumstantial evidence tied directly to the alleged discriminatory animus. *Kirschner v. Office of the Comptroller of New York*, 973 F.2d 88, at 93 (2nd Cir. 1992).

Petitioners here have shown by direct evidence that Argonne's decisions to deny them supervisory positions, to refuse to rehire them, to deny them their contract rights to grievance procedures, to demote them and to lay them off were motivated by racial, ethnicity, and retaliatory animus. The appellate court use of the *McDonnell Douglas* analysis to their claims therefore was error. Excluding the direct evidence from analysis of the jury issues also was error.

In 1989, the Supreme Court further clarified the standard for mixed motive cases, (cases in which decisions were made for discriminatory reasons as well as for legitimate non-discriminatory reasons) in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 252, 104 L.Ed.2d 268, 109 S.Ct. 1775. The Court held that in the event petitioners show that the employer was motivated by an impermissible factor in making a decision, the employer can still prevail by proving as an affirmative defense, that its legitimate reasons, standing alone, would have induced it to make the same decision.

The courts of appeals have consistently applied the *Price Waterhouse* standard in *Ostrowski v. Atlantic Mut. Ins. Companies*, 968 F.2d 171, 180 (2nd Cir. 1992), *Simpson v. Diversitech General, Inc.*, 945 F.2d 156, 159 (6th Cir. 1991), *Kirschner v. Office of the Comptroller of N.Y.*, 973 F.2d 88, 93 (2nd Cir. 1992), *Tyler v. Bethlehem Steel Corp.*, (2nd 1992) 958 F.2d 1176, 1181, Cert. Den.

Once petitioners showed that Argonne supervisors were motivated by race, ethnicity and retaliatory animus in their decisions, the burden shifted to Argonne. Argonne did not meet this burden. Evidence showed that denying Ramaswami promotion on the grounds of lack of qualifications was pretextual because Ramaswami was better qualified than all whites, who were promoted. Evidence showed further that denying Jain promotion and demoting him because of delays was pretextual, because Argonne did not take any actions against whites Faddis, Lazar and Thomas for identical delays. Evidence also showed that Von Zuckerstein was not rehired for any of the 50 positions solely for retaliatory reasons. Bernard's contentions that Von Zuckerstein was not qualified were pretextual because Bernard admitted that he never supervised any of Von Zuckerstein's work, and because Bernard lacked relevant education and experience to be able to make an objective judgment of Von Zuckerstein's qualifications for said positions. Evidence clearly showed that lack of funding was a pretext to lay off petitioners after they sought supervisory positions, and that Argonne current justifications did not motivate it at the time adverse decisions about petitioners were made (e.g. delays occurring after Jain was demoted, complex layoff selection process was put in motion only after the decision was made to lay off Von Zuckerstein because director Kuczen asked that Von Zuckerstein be put in charge of the district heating program).

The employer may not prevail in a mixed motive case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. *Price Waterhouse v. Hopkins*, at 252.

The fact that Argonne supervisors made no effort to offer constructive criticism of Jain's deficiencies before demoting him provides circumstantial evidence of race discrimination. *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1146 (5th Cir. 1991).

On the basis of direct and circumstantial evidence of race, ethnicity and retaliatory discrimination against petitioners, a reasonable jury could find in favor of petitioners on Section 1981 claims.

Appellate court denial to petitioners of standards for direct evidence of racial animus under *TWA v. Thurston*, above, and the standards for mixed motive cases under *Price Waterhouse v. Hopkins*, denied petitioners their 14th Amendment right to due process and equal protection of laws, and the 7th Amendment right to trial by jury.

C.

ARGONNE MAY NOT DENY EMPLOYEES THEIR CONTRACT RIGHT TO IN-HOUSE GRIEVANCE PROCEDURES BECAUSE EMPLOYEES FILED EEOC CHARGES.

The appellate court held that Argonne properly denied Ramaswami his contract right to a grievance procedure because Ramaswami filed an EEOC charge. Without any supporting evidence therefor, the court held that Argonne's participation in the EEOC proceedings was equivalent to all the thorough investigation, airing and resolving steps Argonne was contractually required to do under the in-house grievance procedures.

The appellate court ruling is in conflict with the Supreme Court decision, and further it is in conflict with its own precedent.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1974), the Supreme Court observed that Congress intended to provide parallel and overlapping remedies against discrimination and specifically stated that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a col-

lective bargaining agreement and his cause of action under Title VII".

Decision of the appellate court denied petitioners the parallel and overlapping remedies to discrimination intended by Congress.

Petitioners had a contract right to the grievance procedures and the procedures were provided as an employee benefit. In *EEOC v. Cosmair*, 821 F.2d 1085, 1089 (5th Cir. 1987) the court held that if the employer stopped providing the employee benefits to which he was otherwise entitled simply because he filed a charge, the company would be guilty of retaliation. In *EEOC v. Board of Governors of State Colleges*, 957 F.2d 424, 431 (7th Cir. 1992), Cert. Den. 121 L.Ed.2d 223, the court held that denial of in-house grievance procedures because employees file EEOC charges is discriminatory on its face, and that employees are protected by statutory provisions against retaliation and can file EEOC charges without any adverse employment consequences.

Denial of the grievance procedures to petitioners was discriminatory per se, and in violation of Title VII prohibition on retaliation 42 USC §2000e-3(a).

The decision of the appellate court here runs counter to public policy and discourages voluntary compliance by employers with the employment discrimination laws. Allowing employers to deny employees in-house grievance procedures because employees file EEOC charges would (1) discourage private resolution of discrimination complaints between the employer and employee, (2) shift the entire burden from private employers to the EEOC and the courts, (3) discourage voluntary EEO compliance by employers, (4) cause years of delays in resolution of discrimination complaints, (5) cause greater government involvement and increased costs to the taxpayer, (6) deny employees their contract right to the grievance procedure,

(7) result in less effective EEO enforcement because pertinent data, statistics and evidence from the grievance procedures are never generated, (8) constitute unlawful retaliation under Title VII of the Civil Rights Act of 1964. There are no benefits that would offset the disadvantages.

Denial of the grievance procedures by Argonne constitutes direct evidence of discriminatory intent on the part of Argonne, separate and apart from the direct evidence of discrimination by Argonne supervisors. Appellate court holding that there is no evidence of discriminatory intent on the part of Argonne is therefore in error.

The appellate court also held that Jain and Von Zuckerstein lost their contract right to the discrimination grievance procedure by making unrelated complaints in Argonne "Equity Review". Undisputed evidence showed that the grievance procedure was denied to Jain and Von Zuckerstein because they filed EEOC charges. The court ruling is error. Petitioners should not be denied in-house discrimination complaint procedure because Argonne conducted a review of complaints unrelated to discrimination in another procedure called "Equity Review".

The ruling denied petitioners their 14th Amendment equal protection of the law and due process of law rights, as well as their right to have the issues decided by the jury.

D.

PETITIONERS' PROMOTIONS FROM WORKER TO SUPERVISOR MEET THE "NEW AND DISTINCT RELATIONSHIP" TEST UNDER *PATTERSON*.

The appellate court held that Vresk's and Ramaswami's promotions from a worker to a supervisor (project manager and senior engineer) do not meet the "new and distinct relationship" test under *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363 (1989). The decision

of the appellate court is in conflict with the decisions of other courts of appeals, and with the prior decisions in the 7th Circuit Court of Appeals.

Other courts of appeals held consistently that promotion from non-management position to management position meets the "new and distinct relationship" test under *Patterson. Sitgraves v. Allied Signal, Inc.*, 953 F.2d 570, 573 (9th Cir. 1992), *Wall v. Trust Co.*, 946 F.2d 805, 808 (11th Cir. 1991), *Harrison v. Associates Corp. of North America*, 917 F.2d 195, 198 (5th Cir. 1990), *Mallory v. Booth Refrigeration Supply Co. Inc.*, 882 F.2d 908, 910 (4th Cir. 1989). The 7th Circuit reached the same conclusion in *Taylor v. Western and Southern Life Insurance Co.*, 966 F.2d 1188 (7th Cir. 1992).

Evidence is undisputed that each petitioner was denied promotion into supervisory position from a non-supervisory position.

The court held that because some projects in the project management group were temporary, the exclusion of Vresk from the project management group does not meet the *Patterson* test. While it is true that some projects did end, new projects came in and replaced them. Even though the projects themselves were temporary, the supervisory duties of employees in the project management group were permanent. Vresk complained that he was denied promotion into the work management group to manage successive projects like native born employees in the project management group.

In holding that petitioners' promotions from non-management to management positions do not meet the "new and distinct relationship" test, the court denied petitioners their 14th Amendment right to equal protection of laws and due process, and the 7th Amendment right to have promotion issues decided by jury.

The Supreme Court agreed to review the issue whether the Civil Rights Act of 1991 applies to pending cases. The ruling would impact petitioners here, since it may make all *Patterson* issues moot. In that case petitioners are likely to prevail because the promotions in each case were given to a less qualified, native born employee (Vachta, Bartusek, Schertz, Lazar and Kennedy).

Supreme Court ruling that the Civil Rights Act of 1991 does apply to pending cases would remove *Patterson* constraints, and petitioners' demotion, layoff and retaliation claims would be Section 1981 claims to be decided by jury, not the court. For instance, the jury would decide Jain's demotion claim on the basis of undisputed evidence that in 1983, Sather and Bernard decided to demote Jain because "the sponsor did not want an Indian in charge of the program". Petitioners were denied their 7th Amendment right to a jury on their demotion, layoff and retaliation claims when these claims were decided by the court.

E.

IN REVIEW OF MOTION FOR DIRECTED JURY VERDICT, NON MOVANT'S EVIDENCE IS TO BE BELIEVED, INFERENCES OF FACT SHOULD BE DRAWN IN NONMOVANT'S FAVOR, AND CREDIBILITY AND WEIGHT OF THE EVIDENCE ISSUES SHOULD BE RESOLVED IN NONMOVANT'S FAVOR.

In review of Argonne's motion for directed jury verdict, the appellate court accepted Argonne's version of the facts, eliminated from consideration petitioners' direct evidence of discrimination, drew inferences in favor of Argonne, questioned the credibility of petitioners' evidence, and rejected petitioners' version of the facts.

For instance, the court questioned whether Von Zuckerstein really applied for 50 open positions at Argonne, even though undisputed evidence showed that he did apply, and

the 50 positions were admitted by Argonne attorney in the trial transcript.

The appellate court procedures for reviewing the motion for directed jury verdict are in conflict with the Supreme Court rulings and with the decisions of other courts of appeals.

The Supreme Court ruled that "evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor". *Lytle v. Household Manufacturing*, 494 U.S. 545, at 554 and 555, 108 L.Ed.2d 504, 110 S.Ct. 1331 (1990). In *Masson v. New Yorker Magazine, Inc.*, 115 L.Ed.2d 447, 475 (1991), the Supreme Court held further that questions of credibility and of the weight to be accorded particular evidence must also be resolved in nonmovant's favor.

Other courts of appeal have reached similar results. *Opryland USA v. Great American Music Show*, 970 F.2d 847 (Fed. Cir. 1992), *Tipton v. Bergrohr GmbH*, 965 F.2d 994 (11th Cir. 1992), *Fultz v. Gilliam*, 942 F.2d 396 (6th Cir. 1991), *Stever v. Independent School Dist.*, 943 F.2d 854 (8th Cir. 1991), *Mitchell v. Rice*, 954 F.2d 187 (4th Cir. 1992), *Bayer v. U.S. Dept. of the Treasury*, 956 F.2d 330 (D.C. Cir. 1992), *AFA Tours Inc. v. Whitchurch*, 937 F.2d 82 (2nd Cir. 1991), *International Shortstop Inc. v. Rally's, Inc.*, 939 F.2d 1257 (5th Cir. 1991). By disbelieving nonmovants' evidence and drawing inferences in favor of movant in analysis of the motion for directed verdict, the appellate court denied petitioners their 7th Amendment right to have the case heard and decided by the jury, and further their 14th Amendment right of equal protection of the laws and due process.

F.

RACIALLY MOTIVATED RETALIATION BECAUSE EMPLOYEES ATTEMPTED TO ENFORCE THEIR CONTRACT RIGHTS IS A VALID §1981 CLAIM.

The appellate court held that petitioners' retaliation claims are not Section 1981 claims. The decision is in conflict with decisions in the other courts of appeals, and further it is in conflict with the 7th Circuit precedents.

In *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 494 (6th Cir. 1992) the court held that racially motivated retaliation because employees were enforcing their contract right is a Section 1981 claim. See also *Carter v. South Central Bell*, 912 F.2d 832 (5th Cir. 1990).

Here, petitioners were in the process of enforcing their contract right to a non-discriminatory work environment, and their contract right to an in-house grievance procedure. The contract rights were set forth under mutual obligations of Argonne and employees, in the Argonne personnel manual. The causal link is established by direct and circumstantial evidence as *inter alia*, director Bernard stated that Von Zuckerstein will not be rehired because he is suing Argonne for discrimination. The appellate court acknowledged that Argonne supervisors were motivated by racial animus. The petitioners' evidence thus meets all of the elements of a valid Section 1981 retaliation claim.

The 7th Circuit Court of Appeals recognized retaliation as a Section 1981 claim in *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990) cert. den. 111 S.Ct. 1306 (1991) and in *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1052 (7th Cir. 1991).

By holding that retaliation is not a Section 1981 claim, the appellate court applied different rules of law to petitioners' claims, and thus denied them their 14th Amendment right to equal protection of the laws and due proc-

ess, and their 7th Amendment right to have the jury hear and decide their Section 1981 retaliation claims.

G.

THE CIVIL RIGHTS ACT OF 1991 APPLIES TO PENDING CASES, AND PETITIONERS THEREFORE SHOULD RECOVER DAMAGES, COSTS AND ATTORNEY FEES AFTER PROVING THAT ARGONNE AND ITS SUPERVISORS WERE MOTIVATED BY RACIAL ANIMUS IN DECISIONS AGAINST PETITIONERS.

The appellate court awarded Argonne its costs on appeal even though undisputed evidence showed that Argonne supervisors were motivated by racial animus when making adverse decisions about petitioners, and that Argonne as an institution retaliated against petitioners because they filed EEOC charges.

The appellate court awarded Argonne costs on appeal on January 29, 1993, after the Civil Rights Act became effective on November 21, 1991. This is in conflict with the provisions of the Civil Rights Act of 1991, 42 U.S.C. §2000e-5(g)(2)(B), and the decision of another court of appeal. *Estate of Reynolds v. Martin*, 985 F.2d 470, 476 (9th Cir. 1993).

In *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1181 (2nd Cir. 1992), the court held that even if the employer proves its *Price Waterhouse* affirmative defense, the court may still grant costs and attorney fees. Here, Argonne did not prove its *Price Waterhouse* defense and petitioners are therefore entitled to receive damages, reinstatement, costs and attorney fees in conformance with the provisions of the Civil Rights Act of 1991.

By awarding Argonne its costs on appeal, appellate court denied petitioners their 14th Amendment right to equal protection of laws and due process.

The trial court awarded Argonne $30,000 in costs at the trial level. Petitioners should not pay the substantial sum compounded by costs on appeal after they produced undisputed direct evidence of discrimination and retaliation by Argonne and Argonne supervisors.

The Supreme Court agreed to review the issue whether the Civil Rights Act of 1991 applies to pending cases. The ruling should be applied to petitioners' Title VII and Section 1981 claims for damages, reinstatement, costs, attorney fees and other relief the Court deems appropriate.

H.

DISMISSAL OF TITLE VII CLAIMS WAS AGAINST THE WEIGHT OF EVIDENCE, AND IMPROPER BEFORE JURY VERDICT ON §1981 CLAIMS.

The appellate court held that dismissal of petitioners' Title VII claims was proper. In view of the ample direct evidence of discrimination produced by petitioners, the ruling is against the manifest weight of the evidence.

Should directing the jury verdict be incorrect, dismissal of the Title VII claims is improper because it would deny petitioners the right to have identical claims decided by jury as Section 1981 claims. *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 355-57 (7th Cir. 1987).

CONCLUSION

Appellate court massive departures from the well-established rules of law in this case indicate the need that the standards for review of claims of discrimination against the 20 million Immigrant Americans in the U.S. should be settled by the Supreme Court.

Petitioners respectfully request a Court finding that the phrase "All men are created equal" applies equally to Immigrant Americans under the law.

For all of the foregoing reasons, Petitioners respectfully request that this Court grant a Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-2490

IVAN VON ZUCKERSTEIN, DR. DEVABHAKTUNI RAMASWAMI, DR. MOHAN JAIN, and JOSIP VRESK,

Plaintiffs-Appellants,

v.

ARGONNE NATIONAL LABORATORY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 6304—**James B. Moran**, *Judge.*

ARGUED SEPTEMBER 23, 1992—DECIDED JANUARY 29, 1993

Before CUMMINGS, FLAUM, and KANNE, *Circuit Judges.*

FLAUM, *Circuit Judge.* At the beginning of 1983, Dr. Devabhaktuni Ramaswami, Ivan Von Zuckerstein, Dr. Mohan Jain, and Josip Vresk were all employees of Argonne National Laboratory ("Argonne"). During 1983 and 1984, Argonne initiated lay offs due to reductions in funding. Von Zuckerstein was terminated at the end of 1983. In 1984 Vresk was transferred and reassigned. Jain and Ramaswami were terminated in 1985. Ramaswami, who is Indian by birth, Von Zuckerstein—German, Jain—also Indian, and Vresk—Croat, brought various section 1981 and Title VII claims, alleging that discrimination based

on national origin and race motivated these employment decisions. After plaintiffs' argument, Argonne moved for a directed verdict on the section 1981 claims. The district court granted the directed verdict motion under Fed. R. Civ. P. 50 and dismissed the Title VII claims pursuant to Fed. R. Civ. P. 41(b).[1] We affirm.

I.

Making sense of the various claims brought by the plaintiffs requires some background information. Argonne employs thousands of research scientists and engineers, and each scientist or engineer has responsibilities in two overlapping branches of Argonne's hierarchy—administrative and programmatic. Each scientist or engineer receives a position title that generally describes the functions performed by him or her (e.g., economist). Each job title has three gradations: assistant, full, and senior.

Each Argonne employee is assigned to a division; the divisions relevant to this case are Energy and Environmental Systems ("EES") and Engineering ("ENG"). Every division has a director, one or more associate directors, section heads and supervisors. Division supervisors compile evaluations of employees within their section. During the period at issue in this case, if the senior personnel of a scientist's or engineer's division believed that he or she merited a promotion, the division put together a case and submitted it to Argonne's Personnel Committee A. Among the factors considered in evaluating a request for a promotion are the acknowledged professional standing of the candidate, continued leadership in research, and a noteworthy record of publications.

In addition, each of the scientific and engineering projects at Argonne had its own reporting structure organized through programmatic positions. The person formally re-

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[1] Although Rule 52(c) has since replaced Rule 41(b), this opinion shall refer to the relevant rule as 41(b).

sponsible to Argonne for the project is designated "principal investigator." A "project manager," who may or may not be the same person as the principal investigator, oversees the project. Furthermore, the principal investigator or project manager may be an assistant, full, or senior scientist or engineer. The project manager is responsible for evaluating all personnel working on the project. A written evaluation of the performance of each scientist or engineer is forwarded to that person's administrative supervisor, who in turn prepares summary evaluations. The effect is that a supervisor from one division may evaluate an employee from another division who is assigned to that supervisor's project.

Dr. Devabhaktuni Ramaswami began his career at Argonne in 1962 as a member of what is now Argonne's Engineering Division. Except for one brief lay off in 1973, Ramaswami continued to work without interruption until the reduction in force initiated in 1983. Completion of one aspect of a reactor upgrade project resulted in a decrease in demand for ENG Division personnel of Ramaswami's skill level, and he was scheduled to be laid off. Rather than being immediately laid off, he received a series of temporary assignments in the EES Division. Prior to his final assignment, Ramaswami elected to take an extended vacation. He was terminated in September, 1985. Although he subsequently applied for three positions after his termination, Ramaswami did not receive an offer of employment.

In 1976, Ivan Von Zuckerstein began working as an assistant economist in Argonne's EES Division. His functional job title was systems application economist. When the EES Division was forced to eliminate a number of staff positions because of funding cutbacks, Von Zuckerstein was terminated in June, 1983. He claims to have applied subsequently for more than fifty unspecified positions at Argonne, but other testimony confirmed only eight applications. He was not rehired.

Dr. Mohan Jain was hired as an assistant mechanical engineer in the EES Division in 1980. Jain's primary re-

sponsibilities were in Argonne's Industrial Cogeneration project, for which he served as a principal investigator. After being removed as principal investigator in 1983, he continued to work on the project until his termination in January, 1985. After his termination, Jain applied for a few unspecified positions at the lab but did not receive any job offers.

Josip Vresk began work with Argonne in 1975 as an engineering specialist in the ENG Division. In May, 1981, he was promoted from specialist to full mechanical engineer. In 1984, Vresk's section was relocated from the ENG Division to the Plant Systems Divisions to form the Plant Facilities and Services Division. As part of this reorganization, Vresk's section was divided into several sections, including a Project Management section and Engineering section. Vresk was assigned to the Engineering section. Vresk continues to work at Argonne.

II.

Plaintiffs first contend that the district court denied them their Seventh Amendment right to a jury trial by impermissibly weighing evidence when it ruled on the Rule 50 directed verdict motion. Setting aside for the moment the question of weighing evidence, the prejudice to plaintiffs' Seventh Amendment right apparently lies in foreclosing the jury's opportunity to decide whether discrimination occurred by directing a verdict. While a directed verdict does inevitably preclude a decision by the jury, it certainly does not violate the Seventh Amendment by virtue of that fact alone. On the present facts, if the district court had directed a verdict on plaintiffs' section 1981 claims because it had dismissed their Title VII claims, its directed verdict would then rise to the level of a denial of the Seventh Amendment right to a jury trial. *See, e.g., Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 355-57 (7th Cir. 1987). In this instance the district court did not decide plaintiffs' Title VII claims prior to their section 1981 claims. Thus, the only prejudice alleged here is the directed verdict itself, which is no prejudice at all.

III.

Plaintiffs further contend that the district court improperly weighed the evidence in deciding the motion for directed verdict. Under our *de novo* review of the record, this court will affirm if it finds that "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *see Anderson v. Gutschenritter*, 836 F.2d 346, 348 (7th Cir. 1988). The evidence is construed in the light most favorable to the plaintiffs. Unless we find evidence sufficient to sustain a jury verdict in favor of the plaintiffs, we will affirm the decision of the district court. *Liberty Lobby*, 477 U.S. at 252; *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554, 110 S.Ct. 1331, 1338, 108 L.Ed.2d 504 (1990). While the district court may not resolve conflicts in the testimony or weigh the evidence, it may evaluate evidence at least to the extent of determining whether there is substantial evidence to support the verdict. "[A] mere scintilla of evidence will not suffice." *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984).

A.

As a preliminary matter, it is necessary to sort out what claims plaintiffs were attempting to bring. Plaintiffs alleged discriminatory behavior by Argonne that violates section 1981 and Title VII in the denial of promotion, rehiring, and access to grievance procedures as well as in its lay-off procedure, and discriminatory retaliation and demotion. Section 1981 provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts, . . . as is enjoyed by white citizens." 42 U.S.C. § 1981 (1988). In *Patterson v. McLean Credit Union*, the Supreme Court circumscribed the scope of section 1981 to "the enumerated rights within its express protection, specifically the right to make and enforce contracts." 491 U.S.

164, 181, 109 S.Ct. 2363, 2375, 105 L.Ed.2d 132 (1989).[2] Thus, under this narrow reading, only plaintiffs' denial of promotion, failure to rehire, and denial of access to grievance procedures are cognizable under section 1981 as well as Title VII. The lay off, retaliation, and demotion claims fall exclusively under Title VII.

For the section 1981 claims, plaintiffs alleged in their complaint that the discrimination occurred because the plaintiffs were "foreign born." Unfortunately for the plaintiffs, claims founded on that status are not cognizable under section 1981, which is designed to remedy discrimination based on race or ethnicity.[3] Certainly, the line between national origin and race or ethnicity for section 1981 claims cannot be bright. The Supreme Court acknowledged this fact implicitly in its decision in *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 613, 107 S.Ct. 2022, 2028, 95 L. Ed.2d 582 (1987). "Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics . . . . rather than solely on the place or nation of his origin." Of course, what is not clear from the Court's brief exposition is when the place or nation of origin, which would not be actionable under section 1981, determines ancestry or ethnic characteristics, which would be actionable. Plaintiffs' case would have been stronger had they alleged and argued discrimination based on race or ethnicity rather than national origin; however, failure to plead discrimination based on

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[2] The Civil Rights Act of 1991 has since overruled this portion of *Patterson*. *See* 42 U.S.C. § 1981(b) (defining broadly the right to "make and enforce contracts"). However, the Civil Rights Act of 1991 does not apply retroactively to these cases. *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 207 (1992). Consequently, this case represents one of the few in which we still apply the *Patterson* standards.

[3] Title VII specifically allows for claims stemming from discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (1981).

race or ethnicity for section 1981 purposes is not necessarily fatal to their cause. *See, e.g., Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987) (section 1981 protection extended to employee of Puerto Rican descent who alleged national origin discrimination).

B.

While section 1981 and Title VII differ in the types of discrimination they proscribe, the methods of proof and elements of the case are essentially identical. *Bailey v. Northern Indiana Public Service Co.*, 910 F.2d 406, 410 (7th Cir. 1990). A plaintiff bringing suit under section 1981 or Title VII can meet his burden of proof for establishing intentional discrimination either through direct proof of discriminatory intent, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), or through the indirect, burden-shifting method of proof first elaborated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). While the plaintiffs may have offered evidence of racial animus on the part of supervisors at Argonne, none has offered any direct evidence of discriminatory intent on the part of Argonne. Consequently, plaintiffs must rely on the burden-shifting method of proof.

McDonnell Douglas analysis requires first that the plaintiff establish the alleged discriminatory acts. The defendant must then offer legitimate nondiscriminatory explanations for those acts. A plaintiff may then attempt to show why the defendant's stated justifications are pretextual. With respect to the failure to promote, a plaintiff must prove by a preponderance of the evidence that the plaintiff is a member of a protected group, that the plaintiff applied for and was qualified for the position sought, that the defendant rejected the plaintiff for the position, and that the defendant granted that promotion to a person whose race (or national origin under Title VII) was different from that of the plaintiff's but whose qualifications were similar or less than those of the plaintiff. *Id.* at 802,

93 S.Ct. at 1824; *see Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981).

In an allegation of a failure to promote, a preliminary consideration is whether the positions sought by the plaintiffs constituted "an opportunity for a new and distinct relation between the employee and the employer." *Patterson* at 185, 109 S.Ct. at 2377; *McKnight v. General Motors Corp.*, 908 F.2d 104, 110 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1306 (1991). As this court has already recognized, the "new and distinct relation" standard is difficult to apply. *Partee v. Metropolitan School Dist.*, 954 F.2d 454, 457 (7th Cir. 1992); *McKnight*, 908 F.2d at 109-10. Application of this standard in this instance is particularly awkward because of the dual track system of appointments and assignments at Argonne.

The fact that, in each case, the plaintiffs merely assert a new and distinct relation without further analysis or the defendant claims the contrary does impede our analysis to a certain extent. The record in this regard is rather sparse. Nonetheless, among the circuits it would appear that neither an increase in pay alone, *Harrison v. Associates Corp. of North America*, 917 F.2d 195, 198 (5th Cir. 1990), nor a simple change in status involving no additional responsibilities, *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 168-70 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 956 (1992), constitutes a new and distinct relation under *Patterson*. Therefore, at a superficial level, an Argonne scientist or engineer elevated from associate to full or full to senior does receive a higher salary, an increase in prestige, and additional responsibilities. On the record before us, however, we are not prepared to say that the change rises to the level of a "new and distinct relation." Even assuming, *arguendo*, that such a claim would meet the *Patterson* standard, plaintiffs' claims would not succeed for another reason.

Senior scientist positions are very competitive at Argonne, and the decision to promote is based on a number

of considerations. Ramaswami, lacking any direct evidence of discrimination against Indians, alleges that his denial of elevation to senior status constitutes discrimination. However, the record shows that no one among the senior personnel in his division considered Ramaswami eligible for the position of senior scientist inasmuch as none of them pushed for his promotion. Thus, Ramaswami cannot succeed on this claim without something more.

Von Zuckerstein similarly relies on the indirect method of establishing discrimination, arguing that first hostility toward Central European Jews and later, in a puzzling about-face, hostility toward Germans resulted in his denial of promotion to full scientist. Other than his own assertions, Von Zuckerstein offered no evidence of discrimination. More importantly, Von Zuckerstein's failure to achieve the rank of full scientist appear to lie in his sparse publication record and his inability to work independently. As a result, none of his superiors ever presented a case for his elevation to Personnel Committee A. Finally, no evidence was presented that someone with a similar or less qualified background was promoted to the positions Von Zuckerstein sought.

Jain does not specifically allege the denial of promotion. (The refusal of Argonne to restore Jain to the post of principal investigator does not constitute a failure to promote.) In his testimony he does refer to a single instance in which he was not elevated. (Tr. 1849). However, the job position was available for a full mechanical engineer; since Jain was only an assistant mechanical engineer at that time, he did not meet the qualifications for that position. Because he did not formally pursue a promotion through Personnel Committee A, Jain cannot therefore argue discrimination in a denial of promotion as such.

Vresk does not claim a denial of promotion in the sense of not being elevated from assistant to full engineer; he was already a full mechanical engineer. Rather, he claims that he should have been placed in the Project Management Section of the PFS Division when his section was

moved from EES and broken up. This promotion claim is based on a denial of a programmatic rather than an administrative promotion. To succeed such a claim must "rise[ ] to the level of an opportunity for a new and distinct relation between the employee and the employer." *Patterson*, 491 U.S. at 185, 109 S.Ct. at 2377. Because of the overlapping assignments on the administrative and programmatic ladders and temporary nature of many of the programmatic assignments, it would appear that the programmatic promotion allegedly denied to Vresk on racial grounds does not rise to the level of a claim actionable under section 1981.

C.

Similar to a failure to promote claim, a failure to rehire turns on proof by a preponderance of the evidence that the plaintiff is a member of a protected group, that the plaintiff applied for and was qualified for the position sought, that the defendant rejected the plaintiff for the position, and that the defendant hired or continued to seek a person whose race (or national origin under Title VII) was different from that of the plaintiff's but whose qualifications were similar or less that those of the plaintiff. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *see Burdine*, 450 U.S. at 254, 101 S.Ct. at 1093-94. It is not enough for plaintiffs to state that they were rejected for positions at Argonne.[4] They would need to show that they were qualified for the positions sought as well as to offer evidence either that Argonne deliberately left positions open to avoid rehiring plaintiffs or that Argonne continued to seek applicants with qualifications similar to those of the plaintiffs.

None of the plaintiffs has presented sufficient evidence to maintain such a claim. Ramaswami requested transfers

[4] For the remainder of the opinion, "plaintiffs" refers only to Ramaswami, Von Zuckerstein, and Jain since Vresk is still employed at Argonne.

to three positions prior to being laid off and presented evidence of the qualifications required by Argonne for these positions—two of which sought senior engineers and the other a manager. Assuming that the denial of the request alone constitutes a prima facie case of discriminatory failure to rehire, Ramaswami failed to show that Argonne's reasons (lack of necessary qualifications for the senior positions and insufficient managerial skills) were pretextual. Von Zuckerstein did not identify any specific positions that he may have sought. This testimony alone does not allow even an assessment of whether he would have met the qualifications necessary for those positions or whether Argonne continued to solicit others for those positions. In addition, Von Zuckerstein did not challenge the testimony of another Argonne employee who testified to Von Zuckerstein's lack of qualifications for eight positions sought. Jain similarly failed to identify the specific job descriptions and qualifications for the two positions he sought after being laid off. Determinations of the qualifications for such positions require more detail to measure the particular requirements than would be evident from generic job titles.

D.

Plaintiffs additionally contend that Argonne denied them access to a complete "equity review" in accordance with Argonne's internal grievance procedures. Under Argonne's equity review procedure, the highest official who approved the initial lay off reviews the employee's complaint as well as the lay-off package. If this person again approves the lay off, the Laboratory Director or his designate conducts a final review of the complainant's record. The equity reviews of Von Zuckerstein and Jain were pursued to their conclusions and both received letters confirming their lay offs. Although Ramaswami's internal equity review was interrupted by his filing a claim with the EEOC, he was not prejudiced because Argonne's investigation of grievances filed with the EEOC did not differ meaningfully from its own internal procedures. Ultimately, Argonne

communicated the results of its review to the EEOC rather than notifying Ramaswami directly. None of the plaintiffs were prejudiced under these circumstances.

IV.

The remainder of plaintiffs' claims—for the lay offs, retaliation, and, in the case of Jain, demotion—are cognizable only under Title VII. The district court dismissed these claims pursuant to Rule 41(b).[5] In making this determination, the court is within its prerogative "to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies." *Sanders v. General Services Administration*, 707 F.2d 969, 971 (7th Cir. 1983). We review such a dismissal for an abuse of discretion. *Id.*

A.

Plaintiffs challenge both the choices made in the course of the reduction in force, namely themselves, as well as the financial justifications for the lay offs. As far as Argonne's financial justifications go, this court is reluctant to judge Argonne's business decisions if they are made in good faith. *See Aungst v. Westinghouse Electric Corp.*, 937 F.2d 1216, 1224 (7th Cir. 1991). Certainly, the evidence presented does not indicate any lack of good faith on Argonne's part. Argonne conducted extensive reviews of candidates for lay offs subsequent to the cutbacks in funding.

[5] Plaintiffs attempt to argue that the district court granted the Rule 41(b) motion on the retaliation claims prior to the close of their case-in-chief. *See* Fed. R. Civ. P. 52(c) In its ruling from the bench on April 24, 1991, the district court deferred consideration of the Title VII issues. Plaintiffs had acknowledged that the only Title VII matters they wished to add were jurisdictional in nature and not about damages. (Tr. 2427). Moreover, the trial court considered post-discharge exhibits that may not have been relevant to the jury issues. Consequently, plaintiffs cannot resuscitate these claims on appeal after conceding at trial that they had effectively concluded the presentation of their case.

The fact that funding became available for other divisions or at a later date would not undermine the earlier decisions by Argonne.

With respect to the lay-off claims themselves, the court engages in the *McDonnell Douglas* analysis. 411 U.S. at 802, 93 S.Ct. at 1824. The first stage of this analysis requires that plaintiffs establish a prima facie case of discrimination.

> In the case of a reduction of force, a prima facie case is established with a "showing that [the employee] was within the protected [class], that [the employee] was performing according to his employer's legitimate expectations, that [the employee] was terminated, and that others not in the protected class were treated more favorably."

Williams v. Williams Electronics, Inc., 856 F.2d 920, 922-23 (7th Cir. 1988). It is not clear that any of the plaintiffs have even established a prima facie case of discrimination. For example, in the case of Von Zuckerstein, the only systems application economist retained after the reduction in force was foreign-born. (Tr. 657).

Assuming, as the plaintiffs apparently do, that only asserting discrimination against foreign-born employees at Argonne is sufficient, the next contention is that the reasons advanced by Argonne for the reduction in force—the reduction in funding—were pretextual. According to the procedures Argonne used, each plaintiff was laid off after his abilities as reflected in the evaluations were compared with other employees in positions for which the candidate for lay off was minimally qualified. Plaintiffs presented no evidence that the lower evaluations of these plaintiffs, or of any other foreign-born employee also laid off, were due to intentional discrimination. Consequently, the district court's reliance on the existence of multiple evaluations and a diffuse decisionmaking process to rebut any indication of pretext was not clearly erroneous.

B.

The three plaintiffs also claim that Argonne retaliated against them by refusing to rehire them after they filed discrimination charges. In order to succeed on this claim, plaintiffs must establish the causal link between the filing of a discrimination claim and the refusal to rehire. *See King v. Board of Regents of Univ. of Wisconsin System*, 898 F.2d 533, 540 (7th Cir. 1990). In other words, a plaintiff must show that the filing itself motivated the decision not to rehire. A Title VII retaliation claim also requires plaintiffs to identify positions for which they applied or to introduce evidence that they were qualified for any available positions or to show that Argonne continued to seek applicants for or filled positions with people whose qualifications were the same or less than plaintiffs. As discussed above, plaintiffs either have not identified positions to which they applied after termination or have failed to meet Argonne's qualifications for a position specifically identified. As we held in *King*, the denial of a position by an employer cannot be retaliatory if the applicant is not qualified for the position. 898 F.2d at 540. Thus, there is nothing in the record to suggest that the district court's decision to dismiss the retaliation claims was clearly erroneous.

C.

Finally, Jain contends that his removal as principal investigator of the Industrial Cogeneration Project was racially motivated. Plaintiff's witness testified to a conversation in 1983 with two administrative personnel in which one of the administrators claimed that "the sponsor did not want an Indian in charge of the program." (Tr. 425). Both of those administrators deny such a statement was made. (Tr. 679, 820). Subsequent to the alleged statement, Jain was removed as principal investigator although he continued to exercise programmatic responsibilities on this project. Assuming that this conversation did take place, Jain would have established by inference the existence

of a racial motivation for his removal. However, administrative supervisors from Argonne testified to other credible reasons for his removal, prinicipally extreme delays in the project. Jain offered no reason to suggest that this explanation was pretextual. Consequently, we cannot conclude that the district court's decision to dismiss this claim was clearly erroneous.

For the foregoing reasons, the decision of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 29, 1993

BEFORE:

Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable JOEL M. FLAUM, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge

No. 91-2490

IVAN V. ZUCKERSTEIN, DEVABHAKTUNI RAMASWAMI, MOHAN JAIN, et al.,

Plaintiffs-Appellants

v.

ARGONNE NATIONAL LABORATORY,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 6304, James B. Moran, Chief Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

IVAN VON ZUCKERSTEIN,
et al., Plaintiffs,

v.

ARGONNE NATIONAL
LABORATORY, Defendant.

No. 86 C 6304

United States District Court
N.D. Illinois, E.D.

March 26, 1991.

* * * * *

MEMORANDUM AND ORDER

MORAN, Chief Judge.

Nearly five years ago, plaintiffs Ivan Von Zuckerstein ("Von Zuckerstein"), Devabhaktuni Ramaswami ("Ramaswami"), Han Chang ("Han Chang"), Mohan Jain ("Jain"), and Josip Vresk ("Vresk") filed this action against defendant Argonne National Laboratory ("Argonne"), their former (or, in the case of Vresk, present) employer, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1988) ("Title VII"), and 42 U.S.C. § 1981 (1988) ("section 1981"). With trial two months away, Argonne filed the motions now before this court, seeking to dismiss the section 1981 claim against all plaintiffs and moving separately for summary judgment against plaintiff Poling Chang ("Poling Chang"), executrix of the estate of the now deceased Han Chang. For the following reasons, the motion for summary judgment is denied, and the motion to dismiss is granted in part and denied in part.

DISCUSSION

I. *Motion to Dismiss Section 1981 Claim*

A. *Nature of Alleged Discrimination: Race vs. National Origin*

Section 1981, which draws from the Civil Rights Act of 1866 and the Voting Rights Act of 1970, "prohibits racial discrimination in the making and enforcement of private" as well as public contracts. *Runyon v. McCrary*, 427 U.S. 160, 168 & n. 8, 96 S.Ct. 2586, 2593 & n. 8, 49 L.Ed.2d 415 (1976).[1] In *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987), the Supreme Court, after examining the legislative history of section 1981 and the nineteenth century understanding of the term "race," concluded that Congress intended, through section 1981's proscription of racial discrimination, "to protect from discrimination identifiable classes of persons who are subject to international discrimination solely because of their ancestry or ethnic characteristics." 481 U.S. at 613, 107 S.Ct. at 2028. While establishing this expansive definition of racial discrimination, however, the Court also noted that certain claims—those based "solely on the place or nation of [the plaintiff's] origin, or his religion," *id.*, are not actionable under section 1981. Relying on this latter language, Argonne

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[1] Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contract, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1988).

asserts that plaintiffs' section 1981 claims should all be dismissed because the discrimination alleged in the complaint is based on plaintiffs' national origin. We disagree.

We begin with an analysis of plaintiffs' third amended complaint. Two paragraphs complain generally of discrimination on the basis of "national origin, race and color" (Complaint ¶¶1, 8). Paragraph 3 characterizes each of the five plaintiffs as "immigrants from non-English speaking countries" and identifies them individually:

> Plaintiff Von Zuckerstein is of Central European Jewish origin. Plaintiffs Ramaswami and Jain are of East Indian origin and non-white complexion. Plaintiff Chang is an Asian of Chinese origin and non-white complexion. Plaintiff Vresk is of Yugoslav origin.

Argonne discriminated against Ramaswami, Jain, and Chang, the complaint asserts at paragraph 12, "on the basis of national origin, race and color" and against Von Zuckerstein and Vresk "on the basis of their national origin." In paragraph 9, the complaint describes in general terms the manifestations of Argonne's discrimination; the subparagraphs are couched in terms of discrimination against "immigrants" in favor of "native born Americans." The complaint proceeds in paragraph 10 to enumerate the specific discriminatory conduct that has injured the individual plaintiffs, asserting in some of the subparagraphs that "native born employees" were treated more favorably. The repeated reference to discrimination against employees "who immigrated to the United States from non-English speaking countries" in favor of "native born Americans," Argonne argues, demonstrates that the "heart and soul" of plaintiffs' case is discrimination on the basis of national origin.

Argonne's argument with respect to Chang, Jain, and Ramaswami is clearly untenable. Quoting paragraph 8 of

the complaint, Argonne observes in its memorandum, underscoring for emphasis, that the plaintiffs allege discrimination against its employees who immigrated to the United States from non-English speaking countries. But the cited paragraph goes on to observe that this discrimination is based on the foreign-born employee's "national origin, *race and color.*" (Emphasis added). Paragraph 12, moreover, explicitly asserts that Argonne discriminated against Chang, Jain, and Ramaswami "on the basis of national origin, race and color." These express allegations of racial discrimination are sufficient to defeat Argonne's motion to dismiss. *See Sajous v. First National Bank*, No. 87 C 3564, 1987 WL 28403 (N.D. Ill. Dec. 21, 1987) (section 1981 claim not dismissed where plaintiff alleged discrimination based on his race and his national origin); *Adames v. Mitsubishi Bank, Ltd.*, 751 F.Supp. 1548, 1560 (E.D.N.Y. 1990) (plaintiff "clearly stated an actionable claim under section 1981" by "alleging racial as well as national origin discrimination").

That the complaint refers in several paragraphs to discrimination against immigrants in favor of native-born Americans is of no moment. Despite the clear theoretical distinction between discrimination based on national origin and discrimination based on ancestry or ethnic characteristics (the former is actionable under section 1981, the latter is not), in practice, the line between these two concepts "is not a bright one." *Saint Francis*, 481 U.S. at 614, 107 S.Ct. at 2028 (Brennan, J., concurring); *Korpai v. A.W. Zengeler's Grande Cleaners*, No. 85 C 9130, 1987 WL 20428 (N.D.Ill. Nov. 24, 1987). To the extent that it is clear from the complaint that a plaintiff "is not only alleging discrimination on the basis of [his] place of origin without regard for [his] ethnic background," *Cuello-Suarez v. Autoridad de Energia Electrica*, 737 F.Supp. 1243, 1248

(D.P.R. 1990), the claim is cognizable under section 1981. Paragraphs 1, 3, and 12 all suggest a racial animus behind Argonne's discrimination against Chang, Jain, and Ramaswami, and paragraph 8 makes clear that the term "discrimination against immigrants" incorporates discrimination on the basis of race and color as well as national origin. In light of these references to race and ethnicity, it is apparent that the allegations of discrimination in those paragraphs that do not explicitly mention race or ethnicity were made with regard for the ethnic backgrounds of the plaintiffs. It is improper for this court, moreover, on motion to dismiss, to sift through the various allegations of the complaint to determine the true "heart and soul" of plaintiffs' case; we must construe the allegations and reasonable inferences that can be drawn from them in the light most favorable to the plaintiff. *See Powe v. Chicago*, 664 F.2d 639, 642 (7th Cir. 1981).

Von Zuckerstein's section 1981 claim stands on slightly wobblier legs. In paragraph 12 of the complaint, after alleging that Argonne discriminated against Ramaswami, Chang, and Jain on the basis of national origin, race, and color, plaintiffs assert that the discrimination against Von Zuckerstein was based only on national origin. Von Zuckerstein is entitled to proceed under a section 1981 theory, however, so long as "an allegation of racial animus [is] explicit *or reasonably inferable* from the pleadings." *Anooya v. Hilton Hotels Corp.*, 733 F.2d 48, 50 (7th Cir. 1984) (emphasis added); *see also Cuello-Suarez*, 737 F.Supp. at 1247-48 (allegation of racial discrimination inferred even though plaintiff claimed in her pleadings that "she had been discriminated against because of the fact that she was a '*Dominican national*' and '*on the basis of her place of birth*' ") (emphases in original). In paragraph 3, Von Zuckerstein characterizes himself as "of Central European

Jewish origin"; this representation suggests that he identifies himself for the purpose of this lawsuit by his ethnic rather than national heritage. The references to discrimination based on his immigrant status or nationality, then, cannot be said to have been made without regard for his ethnic background. The juxtaposition in paragraph 12 of the basis of the discrimination against Von Zuckerstein (national heritage) with the basis of the discrimination against Chang, Jain, and Ramaswami (national origin, race, and color) might appear to create a negative implication that racial concerns did not motivate Argonne in discriminating against Von Zuckerstein, but we find it significant that the complaint was filed not long after *Saint Francis*, which broadened the purview of "race" to include "ethnicity," was decided. Before *Saint Francis*, the ethnic group in which Von Zuckerstein claims membership may not have been considered a separate "race," *see Budinsky v. Corning Glass Works*, 425 F.Supp. 786, 788 (W.D.Pa. 1977), and therefore "racial discrimination" would have been a misnomer when applied to Von Zuckerstein.

Argonne's argument is strongest with respect to Vresk, who, like Von Zuckerstein, alleges discrimination in paragraph 12 only on the basis of national origin but who identifies himself in paragraph 3 as "of Yugoslav origin." Characterization as a Yugoslav inherently emphasizes nationality over ethnicity, for the concept of Yugoslavia is a political one; as recent events have illustrated, Yugoslavia is not coextensive with any ethnicity but rather comprises a multitude of them (Serb, Croat, Bosnian Moslem, Slovene, Macedonian, and Albanian). There is simply no such thing as an ethnic Yugoslav. That Vresk's four coplaintiffs have validly stated claims based at least in part on racial discrimination, however, permits an in-

ference that Vresk, too, is complaining of an ethnicity-based animus and certainly puts Argonne on notice of a claim of racial discrimination. Moreover, the four others will shortly be going to trial on this case, including the section 1981 claims, and we see no point in making a precise distinction with respect to this plaintiff now, on the eve of trial. Each plaintiff, of course, will have to prove at that time that the discrimination against him was based on his ethnicity and not on his nationality, and to the extent Vresk—or any plaintiff—fails to make such a showing, that deficiency can be addressed at the end of plaintiffs' case.

B. Timing of Discrimination: During the Making and Enforcing of a Contract?

Citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), Argonne urges this court to dismiss plaintiffs' section 1981 claim, which Argonne maintains relates neither to the making or enforcing of a contract. Although the *Patterson* Court reaffirmed the proposition established in *Runyon v. McCrary* that racial discrimination involving private, as well as public, contracts is actionable under section 1981, it simultaneously cut back on the scope of cognizable claims, holding that section 1981 "does not extend . . . to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." 109 S.Ct. at 2373.

1. *Harassment and Miscellaneous Post-formation Conduct*

The discrimination complained of in *Patterson* included racial harassment by a supervisor during the plaintiff's employment, failure to offer training for higher level jobs, and denial of wage increases, all of which the Court held to be "postformation conduct" and therefore not actionable, however reprehensible. 109 S.Ct. at 2374. In light of this unambiguous precedent, plaintiffs readily admit that their allegations of harassment and other miscellaneous postformation conduct cannot form the basis of a section 1981 claim. Based on plaintiffs' reference to Argonne's initial memorandum and our own understanding of the complaint, we interpret this concession to encompass plaintiffs' allegations of harassment,[2] denials of pay raises and comparable compensation,[3] improper use of grant monies,[4]

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[2] Dismissed from the complaint on the grounds that they allege merely harassment are ¶¶ 9(g) ("[i]mmigrants are given humiliating assignments and/or are told that immigrants are either not wanted or are not suitable for supervisory positions"); 9(h) ("[t]he performance appraisals of immigrants are downgraded"); and parts of ¶¶ 10(a) (Von Zuckerstein was "denied recognition for his work results, given humiliating assignments . . . [and] received false and damaging performance appraisals"); 10(b) (Ramaswami was "denied recognition for his work results and professional awards and distinction"); 10(c) (Jain was "given mediocre reviews when his performance was excellent, . . . [and] blamed for the errors of others"); 10(d) (Chang was "victimized by a racial slur").

[3] Allegations of denials of pay raises are contained in ¶¶ 10(a), 10(b), 10(c), and 10(e). Paragraphs 10(b), 10(c), and 10(e) also assert denials of comparable compensation. Although "denial of comparable compensation" could be construed as discrimination at the formation of the contract, an actionable claim, Argonne, in its memorandum, describes it as post-formation conduct, and plaintiffs concede this characterization (Plaintiffs' Response at 14).

[4] *See* ¶¶ 9(e); 10(a); 10(d).

and denials of access and exposure.[5] Accordingly, Argonne's motion to dismiss these allegations is granted.

2. *Failure to Promote*

With respect to the *Patterson* petitioner's additional allegation that her employer violated section 1981 by failing to promote her, the Court was more receptive. Failure-to-promote claims may be cognizable under section 1981, the Court held, if "the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer." 109 S.Ct. at 2377. Charging the plaintiffs with failing to allege that the promotion constitutes "a new and distinct relation," and further arguing that "mere promotion to a higher level position is not a 'new and distinct' relationship," Argonne asserts that plaintiffs' failure-to-promote allegations must be dismissed.

Whether the position to which a plaintiff might have been promoted would have created a new and distinct relationship between the plaintiff and his employer is a question of fact, *see Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1311-12 (7th Cir. 1989); *Cousins v. American President Lines, Ltd.*, No. 90 C 1145, 1990 WL 70324 (N.D.Ill. May 16, 1990), and a thorny one at that. *See McKnight v. General Motors Corp.*, 908 F.2d 104, 109 (7th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 1306, 113 L.Ed.2d 241 (1991) ("[p]recisely how different the new employment

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[5] Nonactionable allegations of this kind are contained in ¶ 10(a) (Von Zuckerstein was "denied access to important meetings and to program information" and "denied exposure"). This category does not include, however, the allegations in ¶ 10(a) that Von Zuckerstein was "denied access into higher classified jobs" or "denied access to the defendant's grievance procedure."

relation must be to make a racially motivated refusal to create it actionable under section 1981 is not susceptible of a blanket answer"). We need not delve into that thicket, however, for Argonne has presented the issue on motion to dismiss.

Allegations of discriminatory failure to promote appear in several allegations in the complaint.[6] In some paragraphs, plaintiffs refer simply to denials of promotions to "higher ranking positions," *See* ¶¶ 9(b); 10(a); 10(b); *cf.* ¶¶ 10(d); 10(e), while others explicitly assert that Argonne discriminatorily failed to promote the plaintiffs' to supervisory or management positions. *See* ¶¶ 9(a); 9(c); 10(a); 10(b). These allegations are sufficient to state a failure-to-promote claim under section 1981. *See Cousins*, No. 90 C 1145; *Russell v. District of Columbia*, 747 F.Supp. 72, 75-76 (D.D.C. 1990). Plaintiffs' complaint should be dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); the supervisory and management positions that plaintiffs allege were foreclosed to them certainly could constitute new and distinct relations. *See Cousins*, No. 90 C 1145 (citing *Mallory v. Booth Refrigeration Supply Co.*, 882 F.2d 908 (4th Cir. 1989)). We do not understand *Patterson* to im-

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[6] Some of the allegations in the complaint, such as ¶ 9(c)'s assertion that "[i]mmigrants are discriminatorily barred from almost all top supervisory and management positions" and ¶ 10(b)'s claim that "Dr. Ramaswami was discriminatorily denied placement into higher ranking positions," could be construed as complaining either of discriminatory failure to promote or discrimination in initial placement. *See also* ¶ 10(a) (Von Zuckerstein "was discriminatorily denied access into higher classified jobs"). Both interpretations, we think, are reasonable, and under either theory, the allegations should not be dismissed. *See infra* at 1316-17.

pose upon plaintiffs any duty to incorporate specific language in their complaints nor to impart any magical significance on the phrase (as opposed to the concept) "new and distinct relation."[7]

3. *Failure to Consider for New Positions*

Plaintiffs Von Zuckerstein, Ramaswami, Jain, and Chang all allege that Argonne laid them off and then failed to consider them for new positions for which they claim they were eligible. Although discriminatory discharge is not actionable in this Circuit under section 1981, *see McKnight*, 908 F.2d at 108-09, and therefore plaintiff's allegations that they were laid off must be dismissed for section 1981 purposes,[8] we find the failure-to-rehire allegations to state

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[7] Two recent decisions seem to have taken a more formalistic approach to the pleading requirements under *Patterson*. In *Majeske v. Chicago*, 740 F.Supp. 1350 (N.D.Ill. 1990) and *Chicago Fire Fighters Union Local No. 2 v. Chicago*, No. 88 C 3773, 1990 WL 70515 (N.D.Ill. May 8, 1990), failure-to-promote claims were dismissed where the plaintiffs failed to allege that the higher positions represented "new and distinct relations." Each of those cases, however, stressed the plaintiffs' failure to allege any facts from which it could be concluded that the promotion was an opportunity for a new and distinct relation; by contrast, the plaintiffs in this case have explicitly alleged the denial of promotions to supervisory and management positions. To the extent our holding in this case undercuts the *Majeske* and *Chicago Fire Fighters* decisions, we respectfully decline to follow them, particularly because it would be manifestly unfair to require plaintiffs who filed their complaint before *Patterson* to have predicted the precise language that the Supreme Court would use, and dismissal with leave to amend at this juncture, with trial right around the corner, would serve no purpose.

[8] Plaintiffs' claims of removal from grant projects similarly must be dismissed because they assert either discriminatory discharge, which *McKnight* holds to be nonactionable, or discriminatory demotion, which also cannot support a § 1981 claim. *See infra* at 1316.

valid section 1981 claims. The term "laid off" is susceptible of two interpretations. First, as a term of art, "laid off" suggests a temporary removal of an employee from work, which is followed by an organized recall procedure. By contrast, "laid off" may also be used as a euphemism for "fired." Under the former construction, an employee retains certain rights, and if, for example, the recall of employees is conducted contrary to established procedure, an injured employee may sue. *See McKnight*, 908 F.2d at 109-10. The employment relationship, therefore, is not necessarily severed, and the rehiring will only trigger section 1981 protection if the new position rises to the level of a new and distinct relation. *Id.* If the lay-off reflects a more permanent termination, however, a rehiring represents the formation of a new contract within the meaning of section 1981. Construing the allegations in the light most favorable to the plaintiffs, we find the failure-to-rehire allegations sufficiently to assert discrimination with respect to opportunities to enter into new contracts with Argonne; indeed, Argonne itself concedes that "plaintiffs had no recall rights" (Defendant's Memorandum at 16 n. 8).

4. *Discriminatory Demotion or Discrimination upon Hiring*

In general terms in paragraph 9(a) and specifically with reference to plaintiff Jain in paragraph 10(c), plaintiffs assert the discriminatory placement of immigrants in lower-paying professional positions than their "credentials dictate[ ]." These allegations can be construed either as claims of discriminatory post-hiring demotion or as charges of discrimination at the initial hiring stage. We agree with Judge Aspen's decision in *Bush v. Commonwealth Edison Co.*, 732 F.Supp. 895 (N.D.Ill. 1990), that allegations of

demotion relate to post-formation conduct and as such are not actionable under section 1981. Although demotions are in some ways similar to promotions—and significant demotions may lead to "new and distinct relations" between the employer-demoter and the employee-demotee—those similarities are not significant for section 1981 purposes. *But see Kriegel v. Home Insurance Co.*, 739 F.Supp. 1538, 1540 (N.D.Ga. 1990) ("[I]t follows [from the fact that discriminatory promotion remains actionable] that demotion claims remain actionable if the change in position results in 'a new and distinct relation.' "). The discrimination in demotion cases does not occur in the formation of the new relationship; rather, it lies in the termination of the old. The analogy to discharge cases, then, is more persuasive, and *McKnight* establishes unambiguously that discriminatory discharge is strictly post-formation, nonactionable conduct.

To the extent that these allegations purport to state a claim of discrimination in the formation of the original contracts of employment, they would clearly be cognizable under section 1981. Argonne contends in a footnote (and fails to develop elsewhere) that any claims of discrimination at the formation of the plaintiffs' contracts are time-barred by the statute of limitations for section 1981 claims that was in effect in Illinois at the time plaintiffs filed this action. Plaintiffs have not responded to this argument, however, and because the issue was raised only in a footnote, we do not consider it sufficiently presented for decision. *See United States v. Bentley*, 825 F.2d 1104, 1109 (7th Cir.), *cert. denied*, 484 U.S. 901, 108 S.Ct. 240, 98 L.Ed.2d 198 (1987). If the allegations refer to discrimination in the formation of the contracts rather than discriminatory demotion, then, they remain valid under section 1981.

5. *Discrimination in the Enforcement of Contractual Rights*

In addition to protecting the right to enter into contracts without discrimination, section 1981 guarantees "the same right . . . to . . . enforce contracts . . . as is enjoyed by white citizens." Plaintiffs Jain, Ramaswami, Von Zuckerstein, and Chang allege two types of discrimination in the enforcement of contracts: first, they argue that Count II's assertions of Argonne's retaliation against plaintiffs for "fil[ing] charges and/or otherwise ma[king] their intention to proceed under the relevant civil rights acts known to the defendant" validly states a section 1981 claim; and second, they contend that Argonne's alleged denial to Von Zuckerstein of access to its internal grievance procedure (¶ 10(a)) is cognizable under section 1981.

Although the plaintiff in *Patterson* did not allege any discrimination in the enforcement of her contract with McLean Credit Union, the Court nevertheless explained in general terms the scope of that second guarantee of section 1981. The right to be free from discrimination in the enforcement of contracts, the Court expounded,

> embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race. In this respect, it prohibits discrimination that infects the legal process in ways that prevent one from enforcing contract rights, by reason of his or her race, and this is so whether this discrimination is attributed to a statute or simply to existing practices. It also covers wholly *private* efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities, such as labor unions, in enforcing the terms of a contract. Following this principle and consistent with our

> holding in *Runyon* that § 1981 applies to private conduct, we have held that certain private entities, such as labor unions, which bear explicit responsibilities to process grievances, press claims, and represent member [sic] in disputes over the terms of binding obligations that run from the employer to the employee, are subject to liability under § 1981 for racial discrimination in the enforcement of labor contracts. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987). The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights.

109 S.Ct. at 2373 (emphasis in original). Discussing the protection afforded by section 1981 with respect to claims of retaliation, the Seventh Circuit in *McKnight* observed that "[r]etaliation or a threat to retaliate is a common method of deterrence, and if what is sought to be deterred is the enforcement of a contractual right, then, we may assume, the retaliation or threat is actionable under section 1981 as interpreted in *Patterson*, provided that the retaliation had a racial motivation."[9] 908 F.2d at 111. Because the conduct that prompted the alleged retaliation in *McKnight* was an attempt to enforce the plaintiff's rights under anti-discrimination laws, the Seventh Circuit found the claim to fall outside the aegis of section 1981; the court reasoned that statutory anti-discrimination laws "such as Title VII and section 1981 and their state equivalents" are not contractual obligations but rather "a species

[9] The *McKnight* court refused to state with certainty that such a scenario would be actionable under § 1981, however, "out of deference to the [Supreme] Court's strongly expressed preference in *Patterson* for interpreting section 1981 to avoid overlaps with Title VII." *McKnight*, 908 F.2d at 112.

of tort right." *Id.* at 112; *see also Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1535 (11th Cir.), *cert. denied*, ____ U.S. ____, 111 S.Ct. 353, 112 L.Ed.2d 317 (1990).

From plaintiffs' complaint, it appears that they too are alleging nonactionable retaliation by Argonne for prosecuting or attempting to prosecute their statutory rights under civil rights acts. In paragraph 15, which sets forth the conduct that allegedly precipitated the retaliation, plaintiffs aver that after they were discriminated against, "they filed charges and/or otherwise made their intention to proceed *under the relevant civil rights acts* known to the defendant." (Emphasis added). Plaintiffs proceed, in paragraph 16, to describe the manifestations of this retaliation; they allege several specific types of retaliation, including denial of access to internal administrative procedures such as Argonne's grievance procedure, and then generally allege that Argonne "otherwise [sought] to impede these plaintiffs' exercise of their *statutory* rights." (Emphasis added).

Plaintiffs attempt, in their memorandum, to salvage their retaliation claim by asserting the existence of an Argonne Policy and Procedures Manual, which they claim sets forth the rights of employees and which explicitly establishes the right to be free from discrimination in the workplace and in employment and the right to present discrimination claims at an internal grievance procedure. Plaintiffs' Equal Employment Opportunity Commission ("EEOC") charges, they continue, were filed "in part[ ] to enforce these specific contract rights" (Plaintiffs' Response at 13). Even assuming that these provisions rise to the level of contract, *See Duldulao v. St. Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 490, 106 Ill.Dec. 8, 12, 505 N.E.2d 314, 318 (1987), plaintiffs' argument does not bring their claim within the parameters of section

1981. The EEOC is charged with enforcing Title VII of the Civil Rights Act of 1964 and does not entertain or adjudicate private contract disputes. If Argonne had retaliated against plaintiffs for filing a state law breach of contract suit predicated on the provisions in the Argonne Manual or for alleging a pendent state claim of contract breach in the instant action, they might have a claim, but those scenarios are counterfactual.

That leaves the internal grievance procedure. Citing *McKnight*, which expressly noted the absence of an anti-discrimination term in the contract between the plaintiff and his employer in that case, plaintiffs argue that they "have properly alleged that Argonne prevented and/or discouraged the plaintiffs from using the available legal process to enforce the specific anti-discrimination contract right" (Plaintiffs' Response at 13). Plaintiffs' confident assertion that the retaliation argument is "properly alleged" does not persuade us, for it is indeed a stretch to infer this claim from the complaint. But we believe that an internal grievance procedure can rise to the level of a "nonjudicial method of adjudicating disputes" as contemplated by *Patterson*, *see Hayes v. Community General Osteopathic Hospital*, 730 F.Supp. 1333, 1337 (M.D.Pa. 1990), and plaintiffs' complaint, read in conjunction with their memorandum, presents the kernel of a cognizable claim. Because our refusal to dismiss other parts of plaintiffs' section 1981 claim entitles plaintiffs to a jury, and because we write without the guidance of the parties' final pretrial order, we decline to dismiss this claim. We advise the plaintiffs, however, that any lenience we exhibit now will not be echoed at trial, where plaintiffs will have to establish *inter alia* that the Argonne manual creates valid contractual rights and obligations, that the internal grievance procedure is a nonjudicial mechanism for resolving

contract disputes, and that Argonne's specifically retaliated against them for pursuing (or intending to pursue) their *contract claims* in the internal grievance forum.

With respect to plaintiffs' second argument, that Argonne violated section 1981 when it denied Von Zuckerstein access to its grievance procedure, plaintiffs analogize their situation to cases where labor union refused to process grievances under a collective bargaining agreement. *Patterson*, citing *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987), observed that labor unions have been held liable under section 1981 for that sort of discrimination, but only when the grievance that the union refused to process relates to the terms of the collective bargaining contract. *See Patterson*, 109 S.Ct. at 2373; *Goodman*, 482 U.S. at 666, 107 S.Ct. at 2623 ("the collective-bargaining contract contained an express clause binding both the employer and the Unions not to discriminate on racial grounds"). Without the added dimension of a contract dispute at the core of the internal grievance procedure, Argonne's denial of access is nothing more than a violation of a term of its contractual agreement with plaintiffs, which is not actionable under section 1981. *See Hall v. County of Cook*, 719 F.Supp. 721, 724-25 (N.D.Ill. 1989). Argonne would be exposed to section 1981 liability for the denial of access to this forum only if plaintiffs sought there to redress the alleged breach of the manual's anti-discrimination provision. This allegation is not laid out in the complaint, but again, it can be inferred from plaintiffs' memorandum, and we think it best to sort this issue out at trial. To succeed on this claim, plaintiffs will have to establish at that time that they sought to use the internal grievance procedure to vindicate their contractual right to be free from discrimination.

II. *Summary Judgment Against Plaintiff Poling Chang*

In a separate motion filed only against Poling Chang, Argonne asserts that judgment in its favor is warranted as a matter of law in light of Poling Chang's concession that she cannot produce any evidence to support her allegations. Poling Chang is pursuing the discrimination claim on behalf of her husband Han Chang, who died subsequent to filing this suit. In essence, Argonne is arguing that Poling Chang admitted through deposition testimony and responses to interrogatories that she has no knowledge of any facts that would support the allegations pertaining to Han Chang in the complaint. Although Poling Chang was able to identify several individuals who she claimed have knowledge of relevant facts, Argonne continues, she herself could not identify any of those facts known to others.

Argonne's assumption that Poling Chang must be able independently to prove her allegations and must memorize and be able to recite the anticipated testimony of her witnesses is not only incorrect but also close to preposterous. A plaintiff need not personally have knowledge of all of the elements of his case; a passenger injured in a train accident, for example, may successfully sue the train company for negligence even though he has no personal knowledge of how the company's employees conducted themselves during the relevant period. For such purposes witnesses exist. Federal Rule of Civil Procedure 56 is a mechanism for ferreting out weak claims by determining through proxies whether sufficient evidence exists to permit a rational jury to find for the nonmoving party. Speculation on the part of the plaintiff about what his witnesses know is perhaps the most unreliable of all possible proxies; the filter of the plaintiff's understanding and memory can only obscure the truth and cast doubt upon

the accuracy of the evidence, which, through the mouth of the plaintiff, would likely be hearsay anyway. There certainly is no requirement, contrary to Argonne's suggestion, that a nonmovant is limited to this method of proof in contesting a motion for summary judgment.

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), on which Argonne relies in part, does not in any way support Argonne's contention. The plaintiff in that case, pursuing, as administratrix of her husband's estate, a wrongful-death action against Celotex Corporation, apparently did not have personal knowledge that would connect her husband's injuries to any Celotex product. In response to Celotex's motion for summary judgment, however, she produced three documents that she claimed established the existence of a genuine material factual dispute: a transcript of her husband's deposition, a letter from an official of a former employer of her husband, and a letter from an insurance company. Celotex argued successfully at the district court level that it was entitled to summary judgment not because plaintiff-administratrix did not have personal knowledge of facts that would support her claim but rather because the only evidence that she did proffer was not admissible. The court of appeals and the Supreme Court, however, limited their consideration to the issue of whether a party moving for summary judgment must come forward with proof of the absence of any genuine issues of material fact before the nonmoving party is required to respond. Concluding that summary judgment is appropriate whenever the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof regardless of whether the moving party supports its motion with evidence negating the nonmovant's claim, the Court explicitly declined to evaluate the substance of Celotex's motion, observing that

"the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance." 477 U.S. at 327, 106 S.Ct. at 2555. On remand, the D.C. Circuit denied a renewed motion for summary judgment. *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33 (D.C.Cir. 1987), *cert. denied*, 484 U.S. 1066, 108 S.Ct. 1028, 98 L.Ed.2d 992 (1988). To the extent that "the summary judgment principles set forth in *Celotex* are applicable to this case" (Defendant's Reply at 10), then, Argonne is conceding defeat.

Poling Chang is clearly entitled to go beyond her own depositions and answers to interrogatories to establish a genuine issue of material fact,[10] and in her response to Argonne's motion, she offers four pieces of additional evidence: affidavits of her husband Han Chang and Von Zuckerstein; Han Chang's answers to interrogatories; and Han Chang's charge of discrimination filed with the EEOC. In its reply memorandum,[11] Argonne challenges the ad-

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[10] That Poling Chang may have "admitted" the contents of Argonne's 12(m) statement by failing to provide a 12(n) submission does not undermine her efforts to defeat Argonne's motion. The 12(m) statement consists of nothing more than Poling Chang's answers to Argonne's interrogatories and neither establishes the absence of a genuine issue of material fact nor provides Poling Chang with any assertions that she can controvert.

[11] Argonne's original motion and memorandum seeks to demonstrate the absence of a genuine issue of material fact by reference to Poling Chang's answers to interrogatories and deposition alone. Because of this limited focus, Poling Chang contends that Argonne failed to identify those portions of the record that demonstrate the absence of a genuine issue of material fact and that therefore it cannot prevail regardless of the quantum of evidence that Poling Chang is able to produce in defense of her claims; the additional evidence is merely offered in support of an alternative argument. It is quite likely that the foregoing discussion of the deficiencies of Argonne's position conclusively resolves the motion, for *Celotex* clearly places on the moving party

(Footnote continued on following page)

missibility of this evidence, arguing first that the affidavits contradict Poling Chang's own interrogatory answers and deposition testimony and must be disregarded under *Miller v. A.H. Robins Co.*, 766 F.2d 1102 (7th Cir. 1985). While we agree with Argonne that in most cases "[p]arties cannot thwart the purpose of Rule 56 by creating issues of fact through affidavits that contradict their own depositions," *Miller*, 766 F.2d at 1104, neither Han Chang's nor Von Zuckerstein's affidavit contradicts Poling Chang's deposition testimony. Poling Chang does not admit in her deposition a complete lack of proof regarding her claim; she merely disclaimed personal knowledge of the details of the case (*see, e.g.*, Poling Chang Dep. at 35, 59). Von Zuckerstein's and Han Chang's affidavits do not assert to the contrary that Poling Chang has personal knowledge of relevant facts but rather supplement her deposition testimony. Indeed, the only statement that these affidavits contradict is Argonne's assertion that "[Poling] Chang is unable to produce any evidence to sup-

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[11] *continued*

> the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

477 U.S. at 323, 106 S.Ct. at 2553. Argonne's 12(m) statement, moreover, speaks only to Poling Chang's inability personally to prove her allegations. But Argonne does assert in rather sweeping language that "[Poling] Chang can not [sic] produce any evidence to support any of the allegations set forth in her third amended complaint" (Defendant's Memorandum at 1-2), arguably broadening the scope of its motion. Because the parties discuss (Poling Chang in her response and Argonne in its reply) the sufficiency of Poling Chang's additional evidence, and because the issue is so easily resolved in Poling Chang's favor, we continue with our analysis.

port the allegations contained in the third amended complaint" (Defendant's Memorandum at 1).

Argonne next attacks the admissibility of Han Chang's interrogatory answers, affidavit, and charge of discrimination, contending that they are hearsay. Argonne merely asserts that these submissions constitute inadmissible hearsay, failing to point to specific offending passages and to support or document its sweeping allegation of hearsay in any way. And it is not obvious to this court that the facts set forth in these submissions[12] are hearsay; Han Chang's answer to interrogatory number 4, for example, sets forth the details of two instances of alleged discriminatory removal and includes such assertions as "[i]n 1980, plaintiff Dr. Change [sic] was in charge of the development of a report entitled, 'Environmental Implications of Accelerated Gasahol Production,' and was the report's principal contributor."

Despite the patent deficiencies of Argonne's argument, we cannot consider Han Chang's evidence for the purpose of this motion because Han Chang is no longer available to testify at trial. The purpose of a summary judgment motion is to determine whether enough evidence will likely be presented at trial so that a jury could find for the non-moving party. Written substitutes for oral testimony are accepted as indicators of what the jury will hear.

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[12] The cases cited by Argonne in support of its assertion that hearsay statements should not be considered on motion for summary judgment speak to the *content* of the submissions rather than to their form. *See Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 570 n. 4 (7th Cir. 1989) ("Rule 56(c) requires that supporting evidentiary affidavits 'shall set forth facts as would be admissible in evidence.'. . . [O]ur cases have stessed that we are unable to consider hearsay statements that are not otherwise admissible at trial.").

Where an affiant or interrogatory answerer will clearly not be able to repeat the statements in his affidavit or the answers to the interrogatories at trial, that evidence no longer previews testimony that the jury will hear and therefore will not affect in any way what the jury could conclude.

That leaves us with the Von Zuckerstein affidavit. Claiming that this submission, too, must be ignored by the court, Argonne argues that "it is a hodge podge of conclusions unsupported by any foundation or even any assertion by the affiant that he has personal knowledge of the matters discussed . . . [and] also contains rank hearsay" (Defendant's Reply at 5). Argonne illustrates this criticism with three specific examples (¶¶ 3, 9, and 11) and proceeds to condemn "[a]ll of the remaining paragraphs" as "suffer[ing] from similar deficiencies" (Defendant's Reply at 6). To the extent that we consider Argonne's loosely structured argument to constitute a motion to strike Von Zuckerstein's affidavit, *see* 10A C. Wright, A. Miller & A. Kane, *Federal Practice and Procedure* § 2738, at 507 (2d ed. 1983), it does not, beyond the three noted examples, state with sufficient specificity what should be stricken and why. *See* 6 J. Moore, W. Taggart & J. Wicker *Moore's Federal Practice* ¶ 56.22[1], at 56-764 (2d ed. 1985). Moreover, although we agree that statements in affidavits that are nothing more than broad conclusions, *see Corinthian Pharmaceutical v. Lederle Laboratories*, 724 F.Supp. 605, 609 (S.D.Ind. 1989), or that smack of hearsay should be disregarded, much of Von Zuckerstein's affidavit does not fall into either of those categories.

Specifically, paragraphs 7 and 8, in which Von Zuckerstein asserts that Han Chang was removed, by his supervisor, from a position that company policy reserved to him and was replaced by a less-qualified native-born employee

and that this supervisor repeatedly made disparaging remarks about foreign- and in particular Chinese-born employees, contain statements that are admissible and sufficient to establish a prima facie case of discrimination under the indirect method of proof. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 & n. 13, 93 S. Ct. 1817, 1824 & n. 13, 36 L.Ed.2d 668 (1973); *Morgan v. Harris Trust and Savings Bank*, 867 F.2d 1023, 1026-27 (7th Cir. 1989). We note that the evidence submitted by Poling Chang is not overwhelming and perhaps represents only a portion of the case she will present at trial (Von Zuckerstein adverts in his affidavit, for example, to a 28-day deposition). Poling Chang goes well beyond merely identifying the witnesses that she will call at trial, however, and Argonne's motion does not realistically merit much more of a response.

CONCLUSION

For the foregoing reasons, Argonne's motion for summary judgment against Poling Chang is denied. Argonne's motion to dismiss plaintiffs' section 1981 claims is granted with respect to the allegations of harassment, denial of pay raises and comparable compensation, improper use of grant monies, denial of access and exposure, discharge (including removal from grant projects), and demotion; with respect to all remaining allegations, the motion is denied.

[2653]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 6304—Chicago, Illinois—April 24, 1991, 3 p.m.

IVAN VON ZUCKERSTEIN, et al., Plaintiffs,

vs.

ARGONNE NATIONAL LABORATORY, Defendant.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. MORAN
and a jury

APPEARANCES:
For the Plaintiffs: MR. JOHN L. GUBBINS
MR. MARK LE FEVOUR

For the Defendant: MR. R. CLAY BENNETT
MR. DONALD J. MC NEIL
MR. MICHAEL J. MUELLER
MR. BRIAN J. FAHEY

K. JOSEPH SNYDER, RPR, CM
Official Reporter
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* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

[2654] (Proceedings in chambers.)

MR. LE FEVOUR: Hello, Your Honor.

MR. BENNETT: Good afternoon, Your Honor.

THE COURT: Hello.

MR. LE FEVOUR: Your Honor, we cited a case. I don't know if you want a copy of this. That's one that we rely on in the motion. We think it is an interesting case. It is cited in our brief.

THE COURT: Okay. Well, I think we should send the jury home. There is a big difference between ethnicity and national origin. Ethnicity presupposes someone from an identifiable class of people, regardless of matters such as dress, speech, accent, citizenship. It presupposes a group where somebody is saying: We don't want to deal one way or another with that entire group of people—without regard to whether they are immigrants or non-immigrants, purely on the basis of being an ethnic derivation or of a particular race, however your characterize that. Certainly in the cases, it goes all over the lot. Whether we are talking black, Asian, Indian, Pakistani, Iraqi, it really doesn't make much difference for our purposes as to how you characterize it.

The entire thrust of the plaintiffs' complaints to Argonne were really not race or ethnicity but being foreign-born and immigrants. Just looking at the evidence that has been presented, number one, just taking the easiest one first, Mr. [2655] Vresk, there is just nothing to suggest, other than the fact that he did not have the career path that he wished to have, that somebody out there at Argonne had it in for him because he was Croatian.

With Mr. Von Zuckerstein, we end up pretty much with the change of position from being Central European Jewish to, aside from being Jewish, being German primarily because Meshenberg said, in effect: I didn't even know he was Jewish because of his name, he had a "Von" in front

of his name. Suddenly it became German discrimination, again, without any evidence of any systemic discrimination against Germans out at Argonne or, for that matter, Central European Jewish.

With respect to more traditional claims, and certainly Dr. Chang, Jain and Ramaswami fit more comfortably within those traditional claims, again, just looking at the people who were employed out there as scientists and engineers, that if they had any claim, it was not just because they were Chinese or Indian but because they were immigrants with accents that came from foreign countries and the like.

Even if we got past that hurdle, when we get into the area of what is a significant change in contractual relationship, I must say I am certainly not prepared to say today whether I think that a change from assistant to full satisfies Patterson or a change from full to senior. I am also not prepared to say it doesn't. It's marginal. [2656] If you are an assistant, you are, on the basis of the evidence presented, on a continuing probationary status in a sense, since it's five years up or out. Therefore, going to full status does give you a great deal more security, but not like security at a university where you have tenure, because it is so dependent on funding.

I think the evidence made it very clear that people, given the nature of the disciplines needed at Argonne and the changing nature of government funding and government focus, that very competent people could end up being a square peg in a round hole, because the things that they were very good at were no longer the things that the laboratory needed. I can't remember who it was, I think it was either Dr. Jain or Dr. Ramaswami who agreed that was so.

There was a vulnerability, certainly a much greater vulnerability than in a university setting where, once you

have tenure, unless the university collapses around your ears, that you are going to be there for as long as you want to be there so long as you perform to a level of minimal competency.

Going up to senior, is that within Patterson? Again, I don't know one way or the other. I think the evidence established that it usually resulted in some increase in pay, and it certainly was a major step up in prestige.

At the same time, the changes from assistant to full to senior didn't necessarily correlate to changes in supervisory [2657] authority. Indeed, people who may not even be, technically, nearly as good as some other people may end up with major supervisory roles because that's what they are good at. And people who are, technically, absolutely superb may end up with very minimal responsibilities in supervision and management, one, because that is not something that they are good at, or, two, just because it is not something that they are the least bit interested in; they are far more interested in the research.

This is, I must say, rather disjointed, and will continue to be.

To the extent that Dr. Ramaswami is claiming that a failure to become a senior is a denial of a new and distinct relationship within the confines of Patterson, then is that barred by the statute of limitations? No, I don't think so. It is not a status that one need even apply for. It is a status that could occur at any time. It could have occurred right up until the day he left. The fact that he may have indicated a wish to become a senior earlier and even have been recommended by one person for that promotion doesn't forever chill that claim for limitations purposes. It's just the opportunity to be selected for that status is there as long as he is there.

Which gets us, really, to the Title 7 claims, which are in an entirely different posture, because the real ques-

tion at this point is, at the end of the plaintiffs' case, do I believe that they have satisfied their burden in terms of proving, in [2658] the absence of contrary evidence introduced by the defense, the claim that they are making? As to that, a lot of it, I think, they haven't proved. There are certain areas that I feel uncomfortable about, and I would like to hear more about.

Let me give you sort of an overall perspective on this. We get into habits of thought under the McDonnell-Douglas burden-shifting or production-shifting focuses that can end up being somewhat mechanistic in their application if you don't watch it, but the ultimate factual determination that has to be made is, given everything, has a plaintiff established by a preponderance of the evidence that discrimination was a contributing cause to the employment change that took place or didn't take place in some circumstances.

All the way through this, and Lord knows we have now been at it for three weeks, I have sat there and listened to what was going on and attempted to segregate it into an analysis of what actually happened out at Argonne. It certainly hasn't fallen into what is a normal litigation of a discrimination claim. There are some claims that are going to rest pretty much on the smoking gun kind of evidence. There are other claims based on: Well, others weren't treated that way that were not in a protected class. There was a disparity of treatment. Third is a statistical approach. Well, nobody has tried to do a statistical approach and, obviously, it was impossible to do that because the kinds of samples we are talking about are so [2659] small.

Plaintiffs have pointed to possible smoking guns, but they are very minor. A comment by Sather to Chang about "We don't want too many Chinese types" or something to that effect, I think that was who said what to whom by the testimony.

MR. MC NEIL: Sather to Chopra.

THE COURT: To Chopra.

MR. MC NEIL: To Chopra.

THE COURT: It's one we don't even know exactly—well, if it was said, we are not even sure what was meant by that. In an organization where a substantial proportion of the scientific and engineering personnel are of foreign birth, and we have various people, many of whom are of foreign birth who have the responsibilities or significant responsibilities for selecting their staff, it is as easily a comment on don't discriminate yourself in doing something as it is anything else.

You have Eustis or Herbaty, or whatever his name is, one or the other from DOE who supposedly said that he didn't want Indians heading up projects. But that wasn't even from anybody—if it happened, and certainly it is strenuously denied, the most that can be said to have resulted from it is a cosmetic change in who was listed as a PI temporarily in one project without any impact, real impact on responsibilities, pay or anything else.

Then we have one that Mr. Von Zuckerstein testified to [2660] with regard to Bernard, and that one, I leave to later.

The main problem I have got with all this is that the decision-making process out at Argonne is extremely diffused. You have a group at the time of a reduction in funding which selects those positions which must be eliminated because of reduced funding. That group in 1983-1984 selected certain positions. I don't recall even that the evidence was particularly specific on who was in that group. It, obviously, came out of the operating divisions in making those decisions.

Was funding itself kind of a moving target? Obviously, it was.

Were there significant reductions resulting from changes in focus? I think the evidence clearly indicated that, yes, there were.

Within those changing foci, were there temporary shifts from one thing to another as somebody said "We need to finish this out in a more constructive manner," or, "Before we end this I think we ought to at least do that" so that there were continual changes to some extent in what the funding patterns were, I think the evidence established that, yes, that was so.

But there certainly isn't any evidence that the initial RIF decisions as to which positions to eliminate were made other than in good faith or that discriminatory reasons played any role in determining what positions those should be.

Then we have a group deciding: Well, if those [2661] positions are being eliminated, who leaves, who is going to be laid off? There isn't any question that in making that determination that incumbency was a significant factor. And if someone who was in a position that was being terminated was measured as a candidate against someone who was an incumbent that, other things being equal, the incumbent was going to win. I don't think that was particularly specified as a rule of thumb, but in looking at the evidence, it certainly came through that that was of considerable significance.

As I recall, the only one of the five, and here, actually four, because we are not talking about Vresk, who was being measured against, in a different context, it was Mr. Von Zuckerstein, since it was a number of the people that were in his classification who were being RIF'd.

Then we have got what the people in those committees were relying on. To a certain extent, they were relying upon past evaluations. Again, we are not talking about any one person being evaluated all the way through by

a single person without input from anybody else. We are talking about evaluations that were signed by various people in differing years and with differing inputs and, I will say, with a fairly high correlation from year to year with respect to evaluations. Then those evaluations played a role in what a committee decides with respect to who is going to be laid off. Again, does the evidence establish that that fairly ponderous process was not [2662] undertaken in good faith, and that discriminatory reasons played a role in the choices? It didn't indicate that to me.

We had to a certain extent what seemed to me kind of a red herring regarding citizenship. There, we are talking in such a complicated area where, in the first place, if you are over here on a study visa just being used for anything, an exchange visitor visa, for example, just being used for anything requires satisfaction of a host of government regulations, most of which are almost impossible to satisfy. Argonne, given its funding and given the nature of its work, is subject to whatever governmental regulations there are on security, on classification, on citizenship preferences and the like.

Something that did come through in the evidence was the nature of the plaintiffs. I don't doubt for a moment that the plaintiffs, particularly perhaps Mr. Von Zuckerstein, feel deeply that their evaluations and the effect on their career out at Argonne were both blighted by discrimination based on national origin.

I think here we have to consider a little bit about the context in which this whole thing arises. We are talking about intelligent, skilled, proud people with lots of talent, a good deal of creativity, considerable egos, which I think goes with the rest of it, who are very competitive where, unlike somebody running the hundred yard dash, your identity is to a certain extent defined by the regard of your peers, and this is a [2663] society, a rather closed

society but with a lot of contacts with the scientific and engineering community nationally and internationally, where those peers are very similar. It is a somewhat rarefied atmosphere where everybody is good, and some are better than others.

If there is an evaluation, which may or may not be unfair, and I make no judgment at all as to the fairness of the many evaluations that have been introduced into evidence in this case, but to the extent they are less than laudatory, there is a natural tendency for people to say it has to be that there is an improper animus at work somehow, because otherwise it wouldn't have turned out this way; I am better than that. Certainly I think Mr. Von Zuckerstein leaped at that and strongly believes that, but I just don't see it in the evidence.

Let me run through, very briefly, and this is very simplistically, because there was an awful lot of other stuff that was introduced, but let me just characterize the plaintiffs as I saw them from the evidence. They are different. The most solid performers were Dr. Ramaswami and Dr. Chang. We don't know much about Dr. Chang. He got passed over on a project management basis at one point and then was the subject of the RIF.

We know, obviously, a lot more about Dr. Ramaswami because he was here and testified at considerable length, and there isn't any question that he was a solid performer; that he, [2664] on the basis of what was presented, did not do as well as his capabilities indicated that he could do but certainly was a well regarded scientist. If it hadn't been for the mini-disaster in the summer of 1985, I would rather expect that Dr. Ramaswami would still be there.

Here, it is a little hard to disregard what Dr. Schertz had to say, but I do because we are talking about the evidence at the end of plaintiffs' case, although I will say

that it was consistent with my view of the evidence at the end of the plaintiffs' case, and that is that to the extent that the position was being taken that there just wasn't anything possibly that he could do in EES after he got back from India, that there just wasn't room for him anymore, I had serious reservations about that.

The letter from Dr. Ramaswami on July 13, 1985, certainly, is contrary to his testimony as to what was talked about the previous day. We have the evidence in the record prior to the close of plaintiffs' case from the point of view of the laboratory as to what happened. I think that is, to an extent, what happened, although, as I say, I have serious reservations that what happened later was due to an absolute loss of available work in EES.

But what was, it seemed to me, pretty clear from the memorandum, and, I must say, supported by Dr. Schertz's testimony after the close of plaintiffs' case, is that he [2665] thought he put himself on the line for Dr. Ramaswami and felt like he had been betrayed to an extent when he didn't show up to carry through. At that point he, in effect, said: I'm not going to go out of my way to do anything further for him. I did my best, and he didn't appreciate it, and forget it—which is not a discriminatory reason for acting, certainly not anything that's a violation of federal law.

Mohan Jain, good technically, who had certainly run into problems in his biggest venture in supervision, was on the edge certainly with respect to the five-year-up-or-out rule.

Mr. Von Zuckerstein, on that same edge, obviously, good with groups. Those who saw him in action in carrying out those functions thought he did a really good job and were major supporters.

But the record is also clear that, whether warranted or not, what the laboratory wanted and kept telling him

that he had to have, and he wasn't giving them, which was publications, which I understood to be, to a certain extent, the life blood of the laboratory because of the need to have something in hand to justify funding and going on with the project: This is what we have done, and this is what we have accomplished.

Mr. Vresk was really in a very different situation, not really, at least to my sense from his own testimony, so much a research scientist as a good hands-on engineer. That's basically what his career path has been out at the laboratory, [2666] of being a good, solid, competent person in applied engineering and getting facilities put together so that the research projects can go forward.

Again, as to all of them, I just don't see any real evidence that the decisions that were made were based upon discriminatory motivations.

My one area of discomfort, and this, obviously, doesn't apply to Vresk, is what happened afterwards. On the one hand, it was not an area that plaintiffs developed very much. You really didn't spend very much time with any of them on that subject. On the other, I suppose because you didn't, the defense didn't spend much time in terms of examining witnesses on what happened afterwards. Here, I am thinking in terms of people who were at that point, in a real sense, alumni of Argonne who specifically applied for some positions, who kind of had their hat in the ring generally. There were references to not being qualified for certain things, but the record as it now stands doesn't really explain much as to why certain decisions were made:

With respect to Dr. Ramaswami, as I recall, at least three of the four positions called for a senior, which he was not. Unless you can go back and find some discriminatory animus by Committee A—I guess it was Committee A, wasn't it?—that was at that point in 1985 a fact

that couldn't be changed. With respect to some of the others, there was evidence both in [2667] the documents and some testimony regarding what happened, but not enough that I ended up feeling very comfortable one way or the other.

We have here then the statement that Mr. Von Zuckerstein ascribes to Dr. Bernard to, in effect, saying: You are giving us a real hard time, and I don't want to reemploy you—which then raises another matter which nobody has really argued at this point, and that is: What do you mean by "retaliation"? Obviously, if somebody files a charge, and, therefore, an employer says, "Because you filed a charge I am not going to deal with you," that is without question a statutory violation.

Here, with Mr. Von Zuckerstein, it went a good deal further than that in not only individually pursuing a charge, but between group efforts and letter-writing and accusations regarding funding and stealing and various other things, he put himself in a position which was considerably beyond just filing a charge and letting the powers that be process it. There does come a point where an employer in that situation can say: The well is poisoned so much that we wouldn't want you to be reemployed under any circumstances. And where, depending upon what the conduct was, the Court is going to say: And you don't have to. But we really haven't argued that one at all.

One last thing, and that is on the 1981 claim regarding retaliation, it being a breach of an agreement, were the [2668] plaintiffs entitled to a consideration through an internal process? Yes, although it certainly is not the same kind of internal processes you would have in a collective bargaining agreement, binding arbitration, all that sort of thing.

Was there a following of that internal process? I think there, the answer is yes. There were equity reviews.

There was a communication of the results of that review to the plaintiffs or those who pursued that avenue. The mere fact that once there was a charge filed with the EEOC that the laboratory was dealing with the plaintiff through the medium of the EEOC rather than directly doesn't seem to me to change in any essential way the fact that, yes, they went through a process. Once there was a charge, they had to go through a process, not only because of the EEOC but also 11286. This was their obligation. There are now the administrative agencies involved and the lawyers and everybody else. Who talks to whom gets changed somewhat, but the primary obligation, "Yes, we will take a good hard look at it," is the one that they satisfied.

So that's where I am at. I don't know where, exactly, that takes us.

MR. MC NEIL: With regard to the rehire claims, the problem that we have at this point is that jobs at Argonne, as Your Honor has heard on several occasions, are defined by requisition numbers and have specific requirements and specific duties, fall into certain sections. In the case of Mr. Von [2669] Zuckerstein, not one of those jobs has been identified as one for which he applied after he left.

Dr. Jain, in his case, identified two generic job titles, but, again, no idea when he applied for them, no idea what the requirements were or testimony that he met those requirements.

With regard to Ramaswami, all of the positions, three of which you mentioned earlier, were applied for before he left, before he filed his charge. No evidence that those jobs were ever filled, no evidence that he was qualified for the jobs.

THE COURT: I grant you that there is, so far as I can recall, no evidence that any of the jobs for which people

applied were filled. There isn't any question, as I understood the evidence, that a number of them were posted. In fact, that's how they would find out about them.

MR. MC NEIL: With regard to Dr. Ramaswami, he actually identified the postings. With regard to Dr. Jain, that's not true. With regard to Mr. Von Zuckerstein, he did not identify any particular jobs. With regard to Poling Chang's case, there is—

THE COURT: Well, to the extent that people did identify particular jobs, I assume that they were able to identify them because they were posted.

MR. MC NEIL: That's correct. I guess what I am addressing is our ability to defend with regard to jobs for [2670] which the plaintiffs have not even identified the job number, when they applied, and have not introduced any evidence in their case in chief—

THE COURT: Well, at this point, it seems to me that what I need to do or maybe what you need to do is why don't you supplement your motion with respect to that aspect, and have you focus in on that one thing and respond to it, and then let's see where we are at.

In the meantime, until we know what and if, and with the jury gone, we can just suspend things temporarily, because to the extent then we need to go forward, we can go forward.

MR. MC NEIL: Perhaps what we can do, again, to save time, on page 7 of the motion, we raise the arguments in subsection (c) of paragraphs 16 and 17, but the memorandum does go into as much detail as we would ever intend to go into. I know that Your Honor hasn't had this—

THE COURT: I have not had a lot time at it, and I just don't feel comfortable with it.

MR. MC NEIL: So with regard to the rehire positions in the memorandum, we discuss each of the individuals,

starting on page 18, and really would not have anything to add regarding the factual details or the law for that matter.

We list what we believe to be positions that were identified, for example, by Dr. Ramaswami, and we list the positions, we refer to the letter that was submitted, allegedly [2671] submitted—

THE COURT: Well, maybe I better go back and take a look at what you submitted and what you submitted—unless you want to submit some more.

MR. GUBBINS: I think we should take a day to submit more. You are talking about the—

THE COURT: Hiring, the rehires.

MR. MC NEIL: Rehires.

MR. GUBBINS: Okay.

THE COURT: And then figure it out.

Pick a time.

MR. GUBBINS: Friday.

THE COURT: Friday, okay.

MR. GUBBINS: Do you want to meet Friday afternoon then?

THE COURT: No. I would like a chance to sit and read some of this stuff.

MR. GUBBINS: Well, from your remarks, is it that the layoff and all the other things, you don't think there is a case there?

THE COURT: I just don't think there is a case there.

MR. GUBBINS: Okay. Well, let me ask you—

THE COURT: Well, obviously, with respect to the 1981 claims, which have to be based on ethnicity, I don't think there is a case to go to the jury.

[2672] With respect to the Title 7 claims, since I am the person who is making the decision, then it isn't a matter of could a trier of fact reasonably conclude that, but a standard of given the fact that we have had the establish-

ment of plaintiffs being a protected class, and then bad things happened to them, we have had, as part of what we have done during the last three weeks, a fairly considerable exposition from both points of view as to why that happened to them, so that we have gotten in not only the laboratory's justifications and your evidence of pretext. Given all that, then I as the trier of fact am not persuaded, putting that altogether, that discrimination has been a contributing cause to what happened to the careers of those plaintiffs.

I started out saying that the laboratory has a very diffused decision-making process with fairly structured reviews. There are people you can appeal to, and they take another look, and if they don't think there is a sufficient showing of justification they require more. The evaluations coming out of a number of years play a role. So that plaintiffs in a case like this have a very difficult kind of case to prove, because basically what you have got to show is, you have got to persuade the trier of fact that there was some sort of gigantic, sprawling conspiracy where all these different people who factored into the decision-making, or at least a number of the key ones were motivated by discriminatory purposes. I just [2673] don't think you did that.

MR. LE FEVOUR: Your Honor has dealt with a lot of the direct evidence. Is it your finding, just so it is clear, that there was absolutely no circumstantial evidence as to any discrimination? I just want to get that clear for the record.

There was some evidence showing that these men did talk to each other, the ones that the comments were made. I just want to make sure that the ruling of the Court is that there is no circumstantial evidence that would support—

THE COURT: Yes. That there is absolutely nothing that anybody could reasonably say indicated some sort of a bias by somebody? No, I am not going to say that.

What I am saying is that with respect to the jury issues, that there is not enough on which a reasonable trier of fact could rest in saying there is discrimination on the basis of ethnicity, and on the basis of all the evidence that was presented during the course of plaintiffs' presentation, that I am not persuaded at the close of all that evidence that the plaintiff has proved its case by a preponderance of the evidence.

MR. LE FEVOUR: That's fine. One other point, just, again, so we have a record here. On the programmatic promotions that Mr. Wade was discussing today, is your finding that those do not create new and distinct relationships?

THE COURT: I don't think that one can be answered that [2674] simply. I mean, obviously, on the basis of the evidence, there were people who were doing straight research, and then they would be a principal investigator for a while, and then they would go back to straight research, and then they might be a group leader of some sort. You know, it depended on the project. Some projects were big ones, some were small ones. Things kept getting interchanged.

Are some programmatic changes new and distinct relationships? Probably, yes. Are some of them not new and distinct relationships? Probably, no. I don't think any of us are going to know what Patterson means until somebody tells us with a good deal more definition than we have had so far.

MR. GUBBINS: I suppose what we are asking is what in your mind is left to be done as far as what you see open still.

THE COURT: Well, I have, as I said, on the basis of just notes that I made out today, well, actually after lunch, picking up from my notes in a fairly disjointed fashion, unburdened myself. I leave to you whether I have covered all the issues. If I have, the one that I am saying I really want to think about more, and if somebody wants to give me some help on it, I would welcome it, and that is the rehire issue, which is basically a retaliation issue.

MR. MC NEIL: Do you see any need for us to—the way we focused on it in our brief is in a discussion of the prima facie case and the failure to introduce evidence, evidence of [2675] pretext. It is on pages 18 through 22 of the memorandum.

In addition to that, with regard to the Bernard decision-making jobs, I would point out that Dr. Bernard did testify with regard to eight positions as to why Mr. Von Zuckerstein—

THE COURT: Oh, I understand that. It is just that I haven't—

MR. MC NEIL: Well, I think we are satisfied—

THE COURT: If you are satisfied with what you presented, then I leave to you whether you want to supplement or don't want to supplement.

MR. GUBBINS: Well, we want to supplement.

THE COURT: But I, obviously, want to spend some more time on that.

MR. GUBBINS: All right.

MR. BENNETT: And if we decide that we want to add anything, which I don't think we will, we'll get ours in by noon on Friday.

MR. MC NEIL: Maybe, since we are the movant, the best way to go would be, if their brief is due—well, by noon on Friday, it wouldn't leave much time. We could

do a reply by—you will be back next Wednesday? Submit a reply earlier than that, within a day or two.

MR. GUBBINS: Well, we might as well take until Monday. I forgot you will be out of town.

[2676] THE COURT: Why don't you take until Monday, and you take until Wednesday.

MR. MC NEIL: Wednesday.

THE COURT: Well, I have got to go to Washington toward the end of the week. If you file, say, on Monday, can you file, say, by noon on Wednesday?

MR. MC NEIL: We can file by the end of Wednesday.

THE COURT: Okay.

MR. MC NEIL: We may request the Court Reporter to do the Bernard transcript now which we have not ordered. We have ordered the plaintiffs' transcripts with the exception of Poling Chang.

MR. GUBBINS: Okay. Thank you.

MR. BENNETT: Thank you, Your Honor.

PLAINTIFF VON ZUCKERSTEIN: Judge, may I ask one question?

THE COURT: Sure.

PLAINTIFF VON ZUCKERSTEIN: What has the Court felt was the reason for the exclusion of immigrants from management in the EES Division, and has the Court considered the fact that when an immigrant was to move up into the management ranks, that led to his layoff?

THE COURT: Well, the second one I don't really understand.

The first one, I must say, people, I looked upon all [2677] the way through this as somewhat of a red herring, because this case was not about people taking over senior management positions at Argonne.

If somebody like Dr. Chopra or somebody like Dr. Bhattacharyya, if I have got the name pronounced right—

MR. MC NEIL: Bhattacharyya.

THE COURT: —Bhattacharyya, if they were passed over for senior positions and came in with a claim, we would have different issues.

But you, for example—

PLAINTIFF VON ZUCKERSTEIN: I was recommended for promotion. Instead of a promotion, I was laid off.

THE COURT: But we are not talking senior.

MR. LE FEVOUR: Thank you, Your Honor.

MR. MC NEIL: Just mechanically, should we be here tomorrow for the dismissal of the jury?

THE COURT: I leave that to you. I thought they would come in, and I would tell them, probably in the jury room, tell them what happened.

MR. LE FEVOUR: Okay.

MR. MC NEIL: No need to be polled in any way?

THE COURT: No.

Maybe at this juncture, I ought to be the person who talks to them.

MR. LE FEVOUR: Fine, Your Honor. That's fine.

MR. MC NEIL: Thank you.

MR. LE FEVOUR: Thank you, Your Honor.

(Proceedings concluded.)

[DATED MAY 31, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 6304

IVAN VON ZUCKERSTEIN, DR. DEVABHAKTUNI RAMASWAMI, POLING CHANG, DR. MOHAN JAIN and JOSIP VRESK,

Plaintiffs,

vs.

ARGONNE NATIONAL LABORATORY,

Defendant.

MEMORANDUM AND ORDER

On April 24, 1991, this court directed a verdict on §1981 claims and granted a Rule 41(b) dismissal respecting plaintiffs' discrimination claims. We left open the retaliation claims for further consideration. We consider those claims now.

Plaintiffs urge that, in an effort to complete the jury issues as suggested by the court, they have been improperly foreclosed from completing the presentation of their evidence and they therefore move to strike the motions for a directed verdict and Rule 41(b) dismissal. That motion is denied, but with a *caveat*. Plaintiffs called all the witnesses they intended to call. All issues were explored with those witnesses. There was no way to parse discrim-

ination evidence as between ethnicity and national origin, and, indeed, plaintiffs do not now claim they were foreclosed from presenting any testimonial evidence respecting those claims or retaliation claims, nor did they so contend at the time the directed verdict and dismissal motions were presented to the court. Their concern is that certain exhibits were not presented to and therefore not considered by the court. In urging that view, however, they have filed a number of exhibits that were never listed in the final pretrial order and they refer, generally, to evidence that they were going to present in a rebuttal case. We cannot consider exhibits not so listed and not intended to be presented in plaintiffs' case-in-chief. We are mindful, however, that the emphasis was upon completion of the evidence relevant to jury issues and that plaintiffs may well have been reluctant to spend time on post-discharge exhibits bearing wholly on the retaliation claims. We therefore have considered all listed exhibits now urged upon the court by plaintiffs.

The retaliation evidence varies for each plaintiff. We note at the outset that no retaliation claim was advanced by Joseph Vresk in the complaint or in the final pretrial order. We do not dismiss retaliation claims by him because there is none to dismiss. On the basis of the April 24, 1991 findings and conclusions, we hereby enter a judgment for defendant and against plaintiff Vresk.

The parties are in general agreement about the legal standards applicable to the retaliation claims. In the circumstances of this case a plaintiff must show that after he complained about discriminatory treatment he was not rehired and a contributing reason for the failure to rehire was retaliation for the expression of that complaint—a causal link between the complaint and the failure to rehire. There is no dispute that each of the four remaining

plaintiffs complained about discrimination and that they thereafter were not rehired. The real dispute is about the casual link, with defendant contending that, to the extent there were applications, there was insufficient evidence that the plaintiff was qualified for the position or that Argonne filled the position with someone only equally or less qualified than the plaintiff, or filled it at all, or that whoever made the employment decision was even aware of the EEOC charges. It contends, in short, that there was insufficient evidence to support plaintiffs' ultimate burden of establishing a casual link.

We start with the observations that the evidence disclosed that Argonne was not at all adverse to hiring "alumni" and, other things being equal, persons who had demonstrated capabilities in prior Argonne employment probably were preferred. It is also highly probable, given the nature and number of Argonne's professional staff, that charges such as those here would be widely known in the Argonne community. Finally, we note, as we have before, that Argonne's needs for a particular project are often quite specific, and a scientist with excellent general qualifications does not necessarily have the particular qualifications and experience that the project requires.

Turning to the four plaintiffs, it is clear, as plaintiffs come close to conceding, that the retaliation claims of Poling Chang and Dr. Mohan Jain need inferential support from the evidence pertinent to the other two plaintiffs if they are to have any hope of succeeding. Chang is deceased. The evidence is that he wrote a letter on May 23, 1986, in which he asked to be considered for any of eight posted positions. He was not rehired. Plaintiffs' exhibit 9 (or it may be exhibit 10) provides some description of one of those positions, but even with respect to that position we cannot tell whether plaintiff Chang's back-

ground and the requirements of that particular position meshed, nor is there any evidence of who was selected for any of those positions, if anyone was selected at all, and what their comparative qualifications might have been. To conclude that his failure to be selected was the result of retaliatory animus would be rank speculation. Dr. Jain's evidence is just as meager. He applied for two or three positions but he could not recall precisely what they were or what detailed qualifications they required and he did not know anything about the people who filled those positions, if they were ever filled.

We know somewhat more about Dr. Ramaswami's applications, but even here the gaps in information are formidable. Shortly before his layoff became effective on September 30, 1985, after he returned from India, he charged that the layoff was discriminatory and he applied for three positions. Dr. Ramaswami was very selective in his applications, much as he was when he subsequently sought employment elsewhere. Each of the three was a top-of-the-line position. One was as a research program manager, the second was as a senior engineer, and the third was as a senior chemical engineer. As we understand the evidence, he was not, in a technical sense, qualified for two of the positions at the time of application, because he did not have senior status. That status could be conferred at any time, however, and we assume that the lack of status was not an insurmountable barrier to his obtaining those positions. The reasons given for his rejection are, however, wholly consistent with the evidence. Sather acknowledged that Dr. Ramaswami possessed the requisite technical qualifications. The rejection was based upon a lack of management experience and skills. The positions clearly called for major managerial responsibilities, and his background, just as clearly, was as a solid

researcher, not as a manager. We do not know who, if anyone, was ultimately selected for those positions (apparently one was subsequently cancelled) and what their qualifications were. Dr. Ramaswami's claim would be more persuasive if Argonne had selected someone with no more managerial experience than he, but there is no such evidence.

The only other evidence he submits is that on his layoff day, in his presence and after he had filed a charge, the supervisor to whom he was speaking was told to be careful about what he said in view of the pending charge—hardly surprising legal advice—and a contemplated five-day pay status project went awry for unexplained reasons. Neither lends much support to a retaliation charge.

Plaintiff Von Zuckerstein was much more inclusive in his applications, and that course of conduct, in and of itself, creates problems for him. He presented some "smoking gun" evidence, indicating a reluctance by Martin Bernard to rehire him because of his suit against Argonne. Bernard testified that he would have asked Von Zuckerstein to leave if he had reached his seventh year without classification as a full scientist and that he could not have been rehired for a full scientist position. That may be so, but it was not a reason Bernard gave for rejecting Von Zuckerstein's applications for several posted positions. Further, Von Zuckerstein's aggressive, indeed, overly-aggressive, pursuit of his claims, while it raises a question about the limits of Argonne's obligations to him, necessitates a particularly searching review of Argonne's reasons for rejection, and we have reviewed all his testimony as well as the pertinent exhibits. Retaliation proportional to a presumed provocation is a favorite theme of literature and, we think, fiction in those circumstances may well mirror life.

The claim founders, however, on the qualifications for the positions subject to Bernard's responsibility. This court, over a period of weeks, was exposed to considerable evidence respecting the matchup of person with position at Argonne. Education, training, professional experience and performance all played roles in deciding who among the applicants, if anyone, then had the particular skills and qualifications necessary to accomplish the particular project to which that person was assigned. Project funding is geared to reaching results over an established time frame; it does not permit the development of new skills by otherwise talented people who do not have a solid foundation in the skills the project requires. Like a piece in a puzzle, the person has to fit the contours of the space.

This court, over the course of the trial, was also exposed to the process of that matchup, which included a listing of the proposed position, the group assignment, the degree level preferred, the nature of the discipline, a detailed description of the professional qualifications and experience desired, and a detailed job description, in two forms. Bernard wrote at the time, and more recently testified, that Von Zuckerstein was not sufficiently qualified for the positions he sought, and our review of the materials relating to those positions convinces us that that assessment was correct. Perhaps Bernard was pleased, because of the claims against Argonne, to have a reason to reject Von Zuckerstein's applications, but reason he had nonetheless; Von Zuckerstein did not have the requisite qualifications for those positions.

It is conceivable that some of the other positions for which plaintiff applied were a possible matchup, but his testimony is too general to evaluate other positions; the purportedly supporting documents are not listed exhibits and we do not know who, if anyone, filled those positions.

Von Zuckerstein, by his own testimony, applied for approximately 50 positions for which he claimed he was qualified. He clearly was not qualified for those within the ambit of Bernard's responsibility, and even a cursory review of the documents not in evidence but appended to plaintiffs' most recent filing indicates that he clearly was not qualified for most of those as well. By "qualified," we mean in the sense that he was, on the face of it, a good fit for that position. Even if he may have been qualified for a couple of those positions, we could not so determine solely from the documents (which were not exhibits); we do not know who, if anyone, obtained those positions and there is little to suggest that the particular decisionmaker would have wanted to retaliate. The sheer magnitude of positions sought create a logistical problem for plaintiff, since each position raised a number of evidentiary issues. Von Zuckerstein resolved it by confining his proof to positions within the ambit of Bernard's responsibility, where he could present evidence of retaliatory motivation, but that proof was not persuasive.

For the reasons stated herein and on April 24, 1991, this court finds for the defendant and against the plaintiffs, and enters judgment for the defendant.

/s/ James B. Moran
Chief Judge,
United States District Court

May 31, 1991.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

IVAN VON ZUCKERSTEIN ET AL.

v. Case Number: 86 C 6304

ARGONNE NATIONAL LABORATORY

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this court finds for the defendant, ARGONNE NATIONAL LABORATORY and against the plaintiffs, IVAN VON ZUCKERSTEIN ET AL. and enters judgment for the defendant.

Date May 31, 1991

H. STUART CUNNINGHAM
Clerk

/s/ Willie A. Haynes
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 7, 1993

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

IVAN V. ZUCKERSTEIN, DEVABHAKTUNI RAMASWAMI, MOHAN JAIN, et al.,

Plaintiffs-Appellants,

No. 91-2490 v.

ARGONNE NATIONAL LABORATORY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 6304—James B. Moran, Chief Judge.

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the above-entitled cause on March 23, 1993, by plaintiffs-appellants, no judge in active service has requested a vote thereon,* and all of

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* The Honorable Frank H. Easterbrook, Circuit Judge, did not participate in the consideration or decision of this case.

the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

RELEVANT STATUTES

42 U.S.C. Sec. 1981

§ 1981. Equal rights under the law

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

(As amended Nov. 21, 1991, P.L. 102-166, Title I, § 101 105 Stat. 1071.)

* * * * *

42 U.S.C. Sec. 2000e-2

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(m) Except as otherwise provided in this title (42 U.S.C. §§2000e et seq.), an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * * * *

42 U.S.C. Sec. 2000e-3

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title (42 U.S.C. §§2000e-2000e-17), or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title (42 U.S.C. §§2000e-2000e-17).

* * * * *

42 U.S.C. Sec. 2000e-5(g)(2)(B)

§ 2000e-5(g)(2)(B). Enforcement provisions

(B) On a claim in which an individual proves a violation under section 703(m) [42 U.S.C. §2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m) § 42 U.S.C. § 2000e-2(m)].

Supreme Court, U.S.
FILED
OCT 13 1993
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No. 93-374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IVAN VON ZUCKERSTEIN, DR. DEVABHAKTUNI RAMASWAMI, DR. MOHAN JAIN, and JOSIP VRESK,

Petitioners,

v.

ARGONNE NATIONAL LABORATORY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions stated in the petition are *not* raised by the decisions below or the trial court record. This case raises only the following questions, none of which is worthy of review by this Court:

1. Whether the court of appeals, reviewing the record *de novo*, correctly held that plaintiffs failed to introduce evidence sufficient to sustain a jury verdict in their favor on their Section 1981 claims of racial discrimination.

2. Whether the court of appeals correctly held that the district court did not abuse its discretion when it dismissed plaintiffs' Title VII discrimination and retaliation claims pursuant to Rule 41(b).[1]

3. Whether plaintiffs waived all issues relating to retroactivity of the Civil Rights Act of 1991 by failing to brief or argue such issues in the court of appeals.

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[1] The applicable provision has now been replaced by Rule 52(c).

LIST OF PARTIES

The parties to the proceeding in the court of appeals were the petitioners Ivan Von Zuckerstein, Dr. Devabhaktuni Ramaswami, Dr. Mohan Jain and Josip Vresk and the respondent Argonne National Laboratory. In the district court, plaintiffs initially were joined by Dr. Han Chang and later by his executrix, Poling Chang. Dr. Han Chang's appeal was dismissed by the court of appeals on September 3, 1991. On May 18, 1992, this Court denied Poling Chang's petition for a writ of certiorari seeking review of this dismissal.[2]

RULE 29.1 STATEMENT

Pursuant to Rule 29.1, Respondent submits the following information: Argonne National Laboratory is owned by the United States Department of Energy and operated under contract by The University of Chicago.

[2] Accordingly, respondent does not address herein any of petitioners' assertions regarding the claims of Dr. Han Chang.

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No. 93-374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IVAN VON ZUCKERSTEIN, DR. DEVABHAKTUNI RAMASWAMI, DR. MOHAN JAIN, and JOSIP VRESK,

Petitioners,

v.

ARGONNE NATIONAL LABORATORY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Argonne National Laboratory, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgments and opinions of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on January 29, 1993 and April 7, 1993.

STATEMENT OF THE CASE

Petitioners Ivan Von Zuckerstein, Dr. Devabhaktuni Ramaswami, Dr. Mohan Jain, and Josip Vresk (collectively "plaintiffs") are former and current[3] employees of respondent Argonne National Laboratory ("Argonne"). Below, plaintiffs claimed that Argonne discriminated against them in various ways because they were "foreign born."[4] (S.A. 17-18).[5] At trial, and in the court of appeals, plaintiffs narrowed their discrimination claims to those discussed in the Seventh Circuit's opinion:

> Plaintiffs alleged discriminatory behavior by Argonne that violates section 1981 and Title VII in the denial of promotion, rehiring, and access to grievance procedures as well as in its lay-off procedure, and discriminatory retaliation and demotion. . . . [Under] *Patterson v. McLean Credit Union*, . . . only plaintiffs' denial of promotion, failure to rehire, and denial of access to grievance procedures are cognizable under section 1981 as well as Title VII. The lay off, retaliation, and demotion claims fall exclusively under Title VII.

(Pet. App. 5-6).

As the court of appeals noted (understating the case), "Making sense of the various claims brought by the plaintiffs requires some background information." (Pet. App. 2). The petition is of little help, stating a version of the facts unsupported by any record citation (with good reason, since it is not only unsupported by the record but is

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[3] Vresk is the only plaintiff still employed by Argonne.

[4] In their petition, plaintiffs have changed their characterization to "Immigrant Americans."

[5] References to the Supplemental Appendix filed by Argonne in the court of appeals will be designated "S.A."

in some instances directly contrary to the record evidence). The relevant facts established at trial are as follows:

A. Argonne National Laboratory

Argonne, owned by the United States Department of Energy ("DOE") and operated under contract by The University of Chicago, is one of the nation's major federally-funded research and development centers. (S.A. 11). As of 1984, Argonne employed more than 4,000 persons at its two sites in Illinois and Idaho. (S.A. 10-11). Many of the scientists and engineers at Argonne, including several in positions of significant authority, were born in non-English speaking foreign countries. (Tr. 1107-09).[6]

Each scientist or engineer occupies a niche in (at least) two chains of command—one administrative and the other programmatic. For administrative purposes, each scientist or engineer is given a position title which generally describes the functions performed by that individual (*e.g.*, economist, mechanical engineer, chemical engineer, etc.). (Tr. 202). For each such job title, there are three levels or ranks: assistant, full and senior. (*Id.*).

Argonne's guidelines for promotion provide that "[p]romotion to the level of [full] Scientist/Engineer requires ability to work independently in research or other fields, and to perform at a level of an experienced Ph.D. Scientist or Engineer." (S.A. 378). The guidelines also require that an individual seeking promotion have a substantial record of achievement in scholarly publications. (S.A. 379).

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[6] References to the Transcript of Proceedings will be designated "Tr."

Promotion to senior is for a select few at Argonne. (Tr. 206, 1906). Argonne's guidelines for promotion to senior provide as follows:

> The Senior classification is the highest at Argonne for scientists and engineers and is reserved for those staff members who have demonstrated ingenuity, originality, creativity, and leadership in research related activities of a scientific or technologic nature and whose performance at that level is ongoing. . . . For an individual in the field of engineering or applied science his or her professional standing must be such as to merit a professorship at a leading engineering institution or university or a leadership role in a major industrial organization. In general, the standard for Senior level requires evidence that the individual has a record of outstanding achievements and is well known and highly regarded in his/her professional field by national and, usually, by international peers.

(S.A. 380-81).

Each employee is assigned to a division which contains individuals who work in related fields (*e.g.*, nuclear reactors, engineering, environmental). (Tr. 198-202). Each division has a director, one or more associate directors, and various section heads and other administrative supervisors. (*Id.*). These supervisors are responsible for compiling evaluations of employees in their sections, even though these employees may not work closely (or at all) with their administrative supervisors. (Tr. 891-92, 937-38).

During the period relevant to Plaintiffs' claims, if the management of a scientist's or engineer's division believed that he or she merited promotion from assistant to full or from full to senior, the division put together a case and submitted it to an Argonne committee known as "Personnel Committee A." (Tr. 204, 341). Absent such a submission, a scientist or engineer could not be promoted. (Tr. 204).

Each of the scientific or engineering projects at Argonne also has its own programmatic reporting structure. The person formally responsible to Argonne and DOE for the project is designated the "principal investigator." (Tr. 411). The project is headed by a "project manager" who may or may not be the same person as the principal investigator. (Tr. 679-80). The project manager is responsible for supervising and evaluating all individuals working on the project. (Tr. 937-38). His or her written evaluation of the performance of each scientist or engineer on the particular project is forwarded to that employee's administrative supervisor, who reviews all such evaluations for each employee and prepares a summary evaluation. (Tr. 563, 937-38). It is not unusual for individuals in one division to work on projects headed by and primarily staffed by individuals in another division. (Tr. 2341-42).

The project manager or principal investigator may be an assistant, full or senior scientist or engineer. (Tr. 462). A senior scientist is no more likely than an assistant scientist to head up a project. (Tr. 339, 462). Indeed, many senior scientists prefer to spend their time on their own research activities, rather than deal with the headaches of managing projects. (Tr. 215-16, 339).

B. Employment Histories of the Plaintiffs

1. Ivan Von Zuckerstein

Von Zuckerstein was born in Czechoslovakia. (Tr. 1964). At trial, he testified that his "mother was partly Austrian, partly Czechoslovakian or Bohemian" and his father "partly German and partly Jewish." (Tr. 1965).

On December 1, 1976, Von Zuckerstein began working at Argonne as an assistant economist in Argonne's Energy & Environmental Systems Division (the "EES Division").

(S.A. 12). During most of his employment at Argonne, Von Zuckerstein worked on projects studying the feasibility of community energy systems. (Tr. 2177-79).

In March 1983, the EES Division was forced to eliminate ten staff positions as a result of cutbacks in funding. (Tr. 220-21, 651). At the time, Von Zuckerstein was working as a systems application economist.[7] (S.A. 60). Three of the four systems application economist positions in the EES Division were eliminated during the March 1983 layoff. (S.A. 25). The individual retained, Arvind Teotia, was born in India. (S.A. 28; Tr. 657). Since Von Zuckerstein was either unqualified for positions remaining after the reduction in force or less qualified than the incumbents in such positions, his employment was terminated effective May 31, 1983. (S.A. 12, 26-31, 46, 51, 53, 59-60, 66-67, 102-47, 505-06).

At trial, Von Zuckerstein testified that he applied for more than 50 positions at Argonne after his layoff. (Tr. 2108, 2110-11). However, he failed to identify any of these positions. Martin Bernard ("Bernard"), who held management positions responsible for Von Zuckerstein's administrative section and the programs on which Von Zuckerstein worked, did testify as to eight positions for which Von Zuckerstein applied. (Tr. 671-75; S.A. 394-411). Von Zuckerstein was not rehired into any of these positions because he failed to meet the minimum qualifications. (*Id.*).

2. Dr. Devabhaktuni Ramaswami

Ramaswami was born in India. (S.A. 12). In January 1962, Ramaswami was hired by Argonne as a resident

[7] While this was Von Zuckerstein's functional job title, his rank was still assistant economist. (S.A. 31).

research associate in Argonne's Chemical Engineering Division. (S.A. 13). In November 1962, Ramaswami's job title was changed to assistant chemical engineer. (*Id.*). In July 1964, Ramaswami was promoted, after approval by Personnel Committee A, to associate chemical engineer. (*Id.*). In 1972, Argonne dropped the "associate" term and began referring to scientists or engineers with this rank as "full" scientists or engineers. (*Id.*).

On April 16, 1973, Ramaswami was laid off from his job of chemical engineer and placed on unpaid resident associate status. (*Id.*). On June 4, 1973, Ramaswami was rehired as a chemical engineer in the Engineering Division (the "ENG Division"). (*Id.*).

In the early 1980's Ramaswami was working on the SAREF/TREAT reactor upgrade project. (Tr. 101; S.A. 412-19). Completion of the design effort for the project resulted in a reduction in the demand for ENG Division personnel in Ramaswami's job title, and Ramaswami was scheduled for layoff. (S.A. 420-28).

As the result of efforts by his superiors in the ENG Division and management officials in the EES Division, Ramaswami was not laid off. Instead, he obtained a series of temporary assignments to projects headed by individuals in the EES Division. (S.A. 442-46). In July 1985, William Schertz ("Schertz"), Associate Division Director of EES, obtained approval to transfer Ramaswami to the EES Division and to remove him from the list of individuals to be laid off. (S.A. 448). At that time, Schertz requested that Ramaswami begin work immediately on a project with Alan Wolsky ("Wolsky"). (*Id.*). Schertz told Ramaswami that Wolsky had an immediate need for Ramaswami's services and that any delay would seriously jeopardize Ramaswami's work arrangement with Wolsky. (*Id.*). Instead of beginning Wolsky's work, Ramaswami chose to take an

extended vacation. (S.A. 448-49). As a result, Schertz decided that Ramaswami would not be transferred to the EES Division. (S.A. 443, 448). Because there were still no positions for Ramaswami in the ENG Division, he was terminated on September 30, 1985. (S.A. 442-46).

Prior to the effective date of his layoff, Ramaswami requested transfers to three senior positions which had been posted by Argonne. (Tr. 157-67). After he was laid off, Ramaswami was rejected for each of these positions because he lacked the needed skill and experience. (S.A. 452-59; 492).

3. Dr. Mohan Jain

Jain was born in India. (S.A. 14). In January 1980, Jain began working at Argonne as an assistant mechanical engineer in the EES Division. (*Id.*). In 1982, Jain helped Dr. John Bratis, a leader in the field, develop the Organic Rankine Cycle ("ORC") fluid test plan, which was part of Argonne's Industrial Cogeneration project. (Tr. 1796-97). When Bratis left Argonne, Jain became co-principal investigator for the Industrial Cogeneration project, along with Roy J. Faddis ("Faddis"). (Tr. 412-13). Faddis was responsible for administration of the project, while Jain was responsible for technical aspects, including design and construction of four test loops. (Tr. 678).

By 1983, construction of the test loops was considerably behind schedule. (Tr. 1841-44, 1958; S.A. 460-61). The DOE sponsor was extremely dissatisfied with the technical management of the project. (Tr. 678). As a result, Jain's *title* of principal investigator was removed. (Tr. 1742). However, Jain's *responsibilities* did not change significantly. (Tr. 1837-38).

As a result of reduced funding and redirection of programmatic areas, the EES Division had to eliminate one mechanical engineer-industrial cogeneration position in November 1984. (S.A. 269). Applying the layoff procedure, Jain was the lower rated of the two incumbents in this position. (S.A. 274-75). Since Jain was either unqualified for positions remaining after the reduction in force or less qualified than the incumbents in such positions, his employment was terminated effective January 18, 1985. (S.A. 269-73, 274-77).

At trial, Jain testified that he applied for a few positions at Argonne after his layoff. (Tr. 1791-92). However, he did not identify the specific positions for which he applied. (*Id.*). He was not rehired.

4. Josip Vresk

Vresk was born in Croatia but identified himself to Argonne and in his Complaint as Yugoslavian. (Tr. 1469; S.A. 2, 468). On October 1, 1975, Vresk was employed as an engineering specialist with the ENG Division. (S.A. 15). In May 1981, Vresk was promoted from engineering specialist to (full) mechanical engineer. (*Id.*).

In 1984, Vresk's section was moved from the ENG Division and combined with the Plant Systems Division to form the Plant Facilities & Services ("PFS") Division. (Tr. 1505). Vresk's section then was broken up into several sections, including the Project Management section and Engineering section. (Tr. 1506-07; S.A. 465). Vresk was assigned to the Engineering section. (S.A. 465). Among the individuals eventually assigned to the Project Management section was Sam Ambegaoker, who was born in India. (Tr. 1635-36). Rab Malhotra, who also was born in India, was a manager in the PFS Division. (Tr. 1570).

C. Argonne's Layoff Procedures

1. EES Division (Von Zuckerstein and Jain)

At trial, Plaintiffs introduced evidence of the comprehensive procedures used by the EES Division, which employed Von Zuckerstein and Jain, to determine who would be laid off and who would survive in the 1983 and 1984 reductions in force. (Tr. 222-24, 759-61). These procedures were developed by Hay Associates, a human resources consulting firm. (Tr. 1181). After Division management decided which positions to eliminate as the result of funding cutbacks, a nominating committee of nine Division officials met to select candidates for the positions that would remain. (Tr. 223, 576-77). For each position, knowledge and skills necessary to perform the job were identified, and elaborate guidelines were followed for assessing the levels of each candidate's knowledge and skills. (Tr. 222-24, 650-52; S.A. 25-366). Candidates were given ratings, based on their most recent evaluations, for positions they currently held and all other positions for which they had the minimum necessary knowledge and skills. (S.A. 25-366). There also was a list of tie-breaking criteria, the first of which was "affirmative action (minority/female)." (S.A. 27).

When the nominating committee met to assess candidates, two observers from outside the Division were present. (S.A. 26). Individuals familiar with the work of various candidates also were brought into the meeting to share their views of the candidates' knowledge and skills. (S.A. 26-27, 270; Tr. 224).

The Committee then prepared a report (the "layoff package"), which was automatically reviewed by the associate Laboratory director responsible for that division. (S.A. 25-366; Tr. 1180). If the associate Laboratory director approved the layoff package, it was then reviewed by the

Laboratory director's RIF Committee, composed of a division director, a human resources manager, and Argonne's affirmative action officer. (Tr. 1181). This committee was empowered to disapprove the layoff package or send it back to the division nominating committee for further justification of its findings. (Tr. 1182). Both Von Zuckerstein's and Jain's layoff packages were approved. (S.A. 462-63; 505-06).

2. ENG Division (Ramaswami)

When the ENG Division first chose Ramaswami as a candidate for layoff, it followed a procedure similar to that followed by the EES Division. (S.A. 420-28). Although the ENG Division layoff committee did not develop numerical ratings for each candidate, candidates were ranked based upon their most recent evaluations. (*Id.*). Once the committee made its decision, the layoff package it produced went through the same review process as the EES Division layoff package. (Tr. 1180-81). In Ramaswami's case, the director's RIF committee sent the package back for additional justification for Ramaswami's layoff. (S.A. 429-41; Tr. 1182, 2322). The committee then provided a specific reason for choosing to lay off Ramaswami and retain each of five individuals with performance ratings similar to Ramaswami's. (S.A. 429-31; Tr. 2330-35).

After Ramaswami's lengthy series of temporary positions in the EES Division ended, a committee of ENG Division managers once again reviewed Ramaswami's relative qualifications for positions remaining in the Division. (S.A. 442-51). Ramaswami was given a rating based upon his most recent performance evaluations, and he was compared to incumbents with similar ratings. (S.A. 443-46). The committee provided a specific reason for choosing to retain each incumbent and to lay off Ramaswami. (*Id.*).

D. Internal Grievance Procedures

Von Zuckerstein, Ramaswami and Jain all challenged their layoffs pursuant to an Argonne policy known as "equity review." (Tr. 1164-65, 1866, 2106). Under the equity review procedure, the highest Argonne official who initially approved the layoff reviewed the employee's complaint and the layoff package. (S.A. 374). If this official once again approved the layoff, the Laboratory director or his designee(s) would conduct a final review. (*Id.*; Tr. 1079).

In the cases of Von Zuckerstein and Jain, the Laboratory Director completed his review and notified each employee that he had upheld his layoff. (Tr. 2108; S.A. 464). In Ramaswami's case, the equity review process was modified when Ramaswami filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Argonne conducted the same investigation it would have conducted if the normal equity review procedure had proceeded. (Tr. 1167). The only difference was that the findings of the investigation were communicated to the EEOC rather than to Ramaswami directly. (*Id.*).

E. District Court and Seventh Circuit Opinions

Trial began on April 3, 1991. On April 24, 1991, the district court granted Argonne's motion for directed verdict on all of plaintiffs' Section 1981 claims. The court also dismissed, pursuant to former[8] Rule 41(b) of the Federal Rules of Civil Procedure ("Rule 41(b)"), all of plaintiffs' claims of racial or national origin discrimination under Title VII. The court deferred ruling on Argonne's motion to dismiss plaintiffs' Title VII retaliation claims, requesting that the

[8] The applicable provision has now been replaced by Rule 52(c).

parties submit additional argument. (Tr. 2666-70). On May 31, 1991, the court granted Argonne's motion to dismiss plaintiffs' remaining Title VII retaliation claims and entered judgment for Argonne.

The district court directed a verdict in Argonne's favor as to plaintiffs' Section 1981 claims because plaintiffs failed to introduce sufficient evidence to sustain a verdict that they were the victims of discrimination on the basis of their races. (Pet. App. 43). Indeed, they did not even attempt to prove such discrimination. Instead, they spent three weeks attempting (unsuccessfully) to show that they were the victims of systematic discrimination by Argonne against foreign-born employees—a claim not cognizable under Section 1981. (*Id.* at 43-44, 56).

Plaintiffs' Section 1981 claims also failed because they did not introduce sufficient evidence to establish a *prima facie* case of discrimination or to show that the nondiscriminatory reasons given by Argonne for its actions were pretextual. (*Id.* at 47-48). Plaintiffs failed to show that they were qualified for the promotions allegedly denied them or for the positions in which they said Argonne should have rehired them. (*Id.* at 54-55, 64-68). Plaintiffs also failed to show that they were denied access to any internal grievance procedure. (*Id.* at 34).

The district court also dismissed plaintiffs' Title VII claims. Having failed to introduce sufficient evidence to prove a *prima facie* case or show pretext in their promotion, rehire and grievance claims under Section 1981, plaintiffs could not prevail on these claims under Title VII. Plaintiffs' Title VII layoff claims failed because plaintiffs introduced no evidence that the determinations made by the layoff decisionmakers were pretextual. (*Id.* at 57). The district court noted that the diffusion of decisionmaking

authority and the several layers of review in the layoff process imposed upon plaintiffs a burden of showing widespread discriminatory animus which they completely failed to meet. (*Id.*).

Plaintiffs' claims that Argonne refused to rehire them in retaliation for their filing of discrimination charges failed not only because plaintiffs were not qualified for the jobs for which they allegedly applied, but also because plaintiffs failed to show any causal link between their filing of charges and any decision not to rehire them. (*Id.* at 64).

Plaintiffs timely appealed, essentially on the grounds that the district court improperly weighed the evidence in deciding the motion for directed verdict (Pet. App. 5) and abused its discretion in dismissing the Title VII claims under Rule 41(b). The court of appeals affirmed, holding that plaintiffs failed to introduce evidence sufficient to sustain a jury verdict in their favor, the appropriate standard under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 252 (1986). (Pet. App. 5). The court also held that there was nothing in the record to suggest that the district court's decision to dismiss the Title VII claims was clearly erroneous. (Pet. App. 13-15).

REASONS FOR DENYING THE WRIT

I.

Because The Court Of Appeals Followed The Precedents Of This Court, The Decision Below Raises No Questions Worthy Of Review By This Court—Petitioners Just Disagree With The Outcome.

Applying well-settled principles applicable to review of directed verdicts and Rule 41(b) dismissals, the court of appeals correctly concluded that plaintiffs had simply failed to introduce sufficient evidence to state a *prima facie* case of discrimination or retaliation as to any of Argonne's decisions affecting them. The petition is nothing more than an attempt to relitigate the case before this Court—an inappropriate forum in which to revisit issues that turn solely on the unique facts of this case. In several instances, petitioners have distorted either the holdings of the court of appeals or the factual record developed in the district court. The Seventh Circuit's summary of the facts relevant here is complete and accurate; its analysis of the applicable law covers no new ground and departs not at all from this Court's precedents or decisions in other circuits. As the following discussion of each question stated by petitioners shows, there is no reason to grant the writ:

A. The Court Of Appeals Did Not Hold That An Employer Is Not Liable For Discrimination By Its Agents.

As plaintiffs acknowledge in their petition, the Seventh Circuit, like all the courts of appeal, has held that an employer is liable, based on agency principles, for the discriminatory actions of its supervisory personnel. (Pet. 16-17). Nowhere in the opinion below is there any indication that the court departed from these well-settled prin-

ciples. Plaintiffs' mistaken belief that it did apparently is based on a misreading of the following holding:

> While the plaintiffs may have offered evidence of racial animus on the part of supervisors at Argonne, none has offered any direct evidence of discriminatory intent on the part of Argonne.

(Pet. App. 7).

The Seventh Circuit here was simply saying that there was conceivably some evidence that some supervisors may have had racial animus at some point in time, but no direct evidence that this alleged animus affected any employment decision by Argonne. The holding thus turned on the Court's review of the record—it broke no new ground worthy of review by this Court.

B. The Seventh Circuit's Holding That Plaintiffs Produced No Direct Evidence Of Discrimination Is Fully Supported By The Record, And The Court Correctly Applied The Burden-Shifting Analysis Of McDonnell Douglas.

Plaintiffs' contention that the Seventh Circuit misanalyzed their case is based on (a) a misreading of the court's opinion; (b) a misunderstanding of the meaning of "direct evidence"; and (c) misrepresentation of the trial record, particularly the "direct evidence" they claim to have introduced.

Petitioners say that a discrimination plaintiff can shift the burden of proof to his employer by introducing direct evidence of discriminatory intent. (Pet. 18-20). The court of appeals said the same thing, citing (like plaintiffs) *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). (Pet. App. 7). Plaintiffs' assertion that the Seventh Circuit went on to misapply the settled law does not make

this case worthy of the Court's review—especially since the record below belies plaintiffs' assertion.

Plaintiffs point to a few bits of anecdotal evidence and contend that these constitute "direct evidence" sufficient to require the district court to allow their case to go to the jury. " '[B]y definition, direct evidence, if believed by the trier of fact, will prove the particular fact in question, without reliance upon inference or presumption.' " *Lynch v. Belden & Co.*, 882 F.2d 262, 269 (7th Cir. 1989), *cert. denied*, 493 U.S. 1080 (1990) (quoting *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989)). None of the anecdotal evidence discussed by plaintiffs was found by the courts below to have such probative value. To the extent plaintiffs actually introduced the evidence described in their petition,[9] it generally related to their Title VII claims and thus has nothing to do with the appropriateness of the directed verdict. The court of appeals correctly analyzed the import of the evidence cited by plaintiffs as follows:

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[9] Some of the "direct evidence" cited by plaintiffs is no evidence at all—it is fabrication. For example, no one testified that "Jain cannot be a program manager of his program because the 'sponsor did not want an Indian in charge.' " (*See* Pet. 3). The actual testimony is discussed *infra*. Nor did "Supervisor Meshenberg conduct[ ] a study of Von Zuckerstein's ethnicity and determine[ ] it to be German." (*See* Pet. 5). The district court described what actually happened as follows:

> With Mr. Von Zuckerstein, we end up pretty much with the change of position from being Central European Jewish to, aside from being Jewish, being German, primarily because Meshenberg said, in effect, I didn't even know he was Jewish because of his name, he had a "von" in front of his name.

(Tr. 2655). When *plaintiffs' attorney* suggested that there had been a history of animosity between Germans and Jews, Meshenberg agreed. (Tr. 994-95). His acknowledgement of undeniable fact hardly constituted "direct evidence" of a discriminatory animus against Germans in general or Von Zuckerstein in particular.

With regard to Bernard's comment that Von Zuckerstein would not be rehired because he was suing Argonne, the court stated:

> Von Zuckerstein did not identify any specific positions that he may have sought. This testimony alone does not allow even an assessment of whether he would have met the qualifications necessary for those positions or whether Argonne continued to solicit others for those positions. In addition, Von Zuckerstein did not challenge the testimony of another Argonne employee who testified to Von Zuckerstein's lack of qualifications for eight positions sought.

(Pet. App. 11).

As for the alleged comment that a Department of Energy sponsor did not like Indians, the court stated:

> Finally, Jain contends that his removal as principal investigator of the Industrial Cogeneration Project was racially motivated. Plaintiff's witness testified to a conversation in 1983 with two administrative personnel in which one of the administrators claimed that "the sponsor did not want an Indian in charge of the program." (Tr. 425). Both of those administrators deny such a statement was made. (Tr. 679, 820). Subsequent to the alleged statement, Jain was removed as principal investigator although he continued to exercise programmatic responsibilities on this project. Assuming that this conversation did take place, Jain would have established by inference the existence of a racial motivation for his removal. However, administrative supervisors from Argonne testified to other credible reasons for his removal, principally extreme delays in the project. Jain offered no reason to suggest that this explanation was pretextual. Consequently, we cannot conclude that the district court's decision to dismiss this claim was clearly erroneous.[10]

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[10] This was the correct standard, since this claim was cognizable only under Title VII.

(Pet. App. 14-15).

This case thus presents no occasion for this Court to revisit the holding of *Thurston*, as correctly followed by the Seventh Circuit.

C. The Seventh Circuit Did Not Hold That An Employer May Deny An Employee Access To Grievance Procedures Because The Employee Has Filed An EEOC Charge.

Contrary to plaintiffs' assertion, the Seventh Circuit did not hold that employers may deny employees access to grievance procedures because the employees have filed EEOC charges. The court simply affirmed the trial court's finding that plaintiffs *had* access to all the procedures to which they were entitled:

> The equity reviews[11] of Von Zuckerstein and Jain were pursued to their conclusions and both received letters confirming their lay offs. Although Ramaswami's internal equity review was interrupted by his filing a claim with the EEOC, he was not prejudiced because Argonne's investigation of grievances filed with the EEOC did not differ meaningfully from its own internal procedures. Ultimately, Argonne communicated the results of its review to the EEOC rather than notifying Ramaswami directly. None of the plaintiffs were prejudiced under these circumstances.

(Pet. App. 11-12).

Thus, this case does not raise any issue regarding the appropriateness of cutting off internal grievance procedures when a grievant files an EEOC charge.

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[11] The evidence at trial showed that this was the only "grievance procedure" to which plaintiffs sought access.

D. The Decision Below Does Not Raise Any Question As To The Now-Defunct "New And Distinct Relation" Test Under Patterson.

If this Court were inclined to revisit the now-defunct "new and distinct relation" test of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), this would not be the case in which to do so. Except as to plaintiff Vresk, the court of appeals' affirmance of the directed verdict as to plaintiffs' promotion claims did not rest on *Patterson*:

> . . . Even assuming, *arguendo*, that [plaintiffs' promotion] claim[s] would meet the *Patterson* standard, plaintiffs' claims would not succeed for another reason.
>
> Senior scientist positions are very competitive at Argonne, and the decision to promote is based on a number of considerations. . . . [T]he record shows that no one among the senior personnel in his division considered Ramaswami eligible for the position of senior scientist inasmuch as none of them pushed for his promotion. Thus, Ramaswami cannot succeed on this claim without something more.
>
> Von Zuckerstein similarly relies on the indirect method of establishing discrimination, arguing that first hostility toward Central European Jews and later, in a puzzling about-face, hostility toward Germans resulted in his denial of promotion to full scientist. Other than his own assertions, Von Zuckerstein offered no evidence of discrimination. More importantly, Von Zuckerstein's failure to achieve the rank of full scientist appear [sic] to lie in his sparse publication record and his inability to work independently. As a result, none of his superiors ever presented a case for his elevation to Personnel Committee A. Finally, no evidence was presented that someone with a similar or less qualified background was promoted to the positions Von Zuckerstein sought.
>
> Jain does not specifically allege the denial of promotion. (The refusal of Argonne to restore Jain to the

> post of principal investigator does not constitute a failure to promote.) In his testimony he does refer to a single instance in which he was not elevated. (Tr. 1849). However, the job position was available for a full mechanical engineer; since Jain was only an assistant mechanical engineer at that time, he did not meet the qualifications for that position. Because he did not formally pursue a promotion through Personnel Committee A, Jain cannot therefore argue discrimination in a denial of promotion as such.
>
> Vresk does not claim a denial of promotion in the sense of not being elevated from assistant to full engineer; he was already a full mechanical engineer. Rather, he claims that he should have been placed in the Project Management Section of the PFS Division when his section was moved from EES and broken up. This promotion claim is based on a denial of a programmatic rather than an administrative promotion. To succeed such a claim must "rise[ ] to the level of an opportunity for a new and distinct relation between the employee and the employer." *Patterson*, 491 U.S. at 185, 109 S.Ct. at 2377. Because of the overlapping assignments on the administrative and programmatic ladders and temporary nature of many of the programmatic assignments, it would appear that the programmatic promotion allegedly denied to Vresk on racial grounds does not rise to the level of a claim actionable under section 1981.

(Pet. App. 8-10).

Plaintiffs' disagreement with these holdings is based entirely on their own unsupported version of the facts, not on any quarrel with the law applied by the Seventh Circuit. This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent find-

ings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949). Plaintiffs' disagreement with the outcome of the Seventh Circuit's review of the record is no ground for review by this Court.

E. The Court of Appeals Followed This Court's Precedents In Reviewing The Directed Verdict.

Plaintiffs' attack on the Seventh Circuit's affirmance of the directed verdict also focuses not on an improper standard of review but on plaintiffs' unhappiness that the court of appeals did not see things their way when it applied the appropriate standard. The Seventh Circuit correctly set forth the ground rules as follows:

> Plaintiffs further contend that the district court improperly weighed the evidence in deciding the motion for directed verdict. Under our *de novo* review of the record, this court will affirm if it finds that "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *see Anderson v. Gutschenritter*, 836 F.2d 346, 348 (7th Cir. 1988). The evidence is construed in the light most favorable to the plaintiffs. Unless we find evidence sufficient to sustain a jury verdict in favor of the plaintiffs, we will affirm the decision of the district court. *Liberty Lobby*, 477 U.S. at 252; *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554, 110 S.Ct. 1331, 1338, 108 L.Ed.2d 504 (1990). While the district court may not resolve conflicts in the testimony or weigh the evidence, it may evaluate evidence at least to the extent of determining whether there is substantial evidence to support the verdict. "[A] mere scintilla of evidence will not suffice."

La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1410 (7th Cir. 1984).

(Pet. App. 5).

Plaintiffs agree that these are the appropriate standards, but accuse the court of appeals of departing from them. There is nothing in the court of appeals' opinion to support these accusations. Plaintiffs seek review by this court despite the absence of any important question of law because the court of appeals rejected the version of the facts set forth in the petition. That version of the facts nowhere appeared in the record below, and this is not the forum in which to retry plaintiffs' case.

F. The Seventh Circuit Has Never Held That Racially Motivated Retaliation Is Not Cognizable Under Section 1981.

The Seventh Circuit held that plaintiffs' retaliation claims were brought under Title VII because plaintiffs were claiming that Argonne retaliated against them for filing Title VII charges with the EEOC. Plaintiffs cite no authority to the effect that such claims are cognizable under Section 1981. They state only that "racially motivated retaliation" claims can be brought under Section 1981, and, *as plaintiffs point out in their petition*, the Seventh Circuit agrees. (Pet. 27) (citing *Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036 (7th Cir. 1991), *cert. denied*, 113 S. Ct. 207 (1992); *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991)). To the extent plaintiffs claimed that Argonne took adverse action against them based on their *race*, the courts below considered their claims cognizable under Section 1981. (Pet. App. 6, 18-19). To the extent plaintiffs were claiming retaliation for filing EEOC charges,

the courts below considered their claims cognizable only under Title VII. There was no error here,[12] and thus nothing to merit this Court's review.

II.

Petitioners Raised No Issue Below Regarding Retroactivity Of The Civil Rights Act Of 1991.

Below, plaintiffs never argued that the Civil Rights Act of 1991 (the "Act") applied to their claims, and they cannot do so now.[13] This is not the forum in which to raise such issues for the first time.[14] *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

Had it not been waived below, the issue of retroactivity still would be unworthy of review by this Court because it is raised by plaintiffs in a context unworthy of review by *any* court. Plaintiffs' suggestion that under the Act *they* would be awarded costs here is based on a misreading of 42 U.S.C. § 2000(e)-5(g)(2)(B). That provision defines the relief available to plaintiffs who *prevail* in a Title VII case by proving that their employer was motivated by a protected characteristic. Here, the trial court found, and the court of appeals affirmed, that Argonne was *not* moti-

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[12] *See, e.g., McKnight v. General Motors Corp.*, 908 F.2d 104, 112 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1535 (11th Cir.), *cert. denied*, 498 U.S. 943 (1990).

[13] In the district court and court of appeals, plaintiffs were represented by attorneys experienced in employment-related litigation.

[14] This term, the Court will decide whether the Act is retroactive in cases in which the issue *was* argued below. *Landgraf v. USI Film Prod.*, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 1250 (1993); *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1250 (1993).

vated by plaintiffs' race, national origin, or filing of EEOC charges when it took adverse action against plaintiffs. The notion that plaintiffs should *still* be entitled to costs is absurd.

III.

Both Argonne And The Seventh Circuit Agreed That If A Verdict Had Not Been Directed On Plaintiffs' Section 1981 Claims, The Rule 41(b) Dismissal Of Identical Claims Brought Under Title VII Would Have Been Improper.

The final issue raised by plaintiffs is not raised by this case. Both Argonne and the court of appeals acknowledged below that if a verdict had not been directed on plaintiffs' Section 1981 claims, the Rule 41(b) dismissal of identical claims brought under Title VII would have been improper. As the court of appeals correctly held:

> On the present facts, if the district court had directed a verdict on plaintiffs' section 1981 claims because it had dismissed their Title VII claims, its directed verdict would then rise to the level of a denial of the Seventh Amendment right to a jury trial. *See, e.g., Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 355-57 (7th Cir. 1987). In this instance the district court did not decide plaintiffs' Title VII claims prior to their Section 1981 claims. Thus, the only prejudice alleged here is the directed verdict itself, which is no prejudice at all.

(Pet. App. 4).

Even plaintiffs do not disagree with this; they simply misunderstand it. Accordingly, there is nothing here to review.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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